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No. _____

In The

Supreme Court of the United States

OCTOBER TERM 1998

MONEM KABIR AND GREGORY P. RUEBUSCH

Petitioner

v.

SILICON VALLEY BANK
ROBERT GIONFRIDDO
ROBERT McMILLAN
SHERRY STEVENS
MARC CADIEUX
ROGER SMITH
JOHN DEAN
BACKSTROM & NEAL
MICHAEL SPENCE
ROBERT DANEY
WON CHOE

Respondents.

On Petition for Writ of Certiorari to the California State Supreme Court

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PETITION FOR WRIT OF CERTIORARI

MONEM KABIR
In Propria Persona
626 West 1500 North
West Bountiful, Utah 84087
(801)298-9416

GREGORY P. RUEBUSCH
In Propria Persona
3377 Filomena Ct.
Mountain View, California 94040
(650)938-8847

This Petition raises the question of equal protection under the law and due process for the rights of Citizens of the United States. It addresses the issue of how an injunction issued in the California civil courts resulted in an unwarranted violation of citizens' First Amendment constitutional right to freedom of speech and lead to due process violations of the Fourteenth Amendment.

I. IF THIS ORDER IS ALLOWED TO STAND NOT ONLY WILL THE FIRST AMENDMENT RIGHTS OF PETITIONERS, GUARANTEED UNDER THE UNITED STATES CONSTITUTION AND CALIFORNIA CONSTITUTION BE VIOLATED, BUT IT WILL VIOLATE THE PETITIONERS' FOURTEENTH AMENDMENT RIGHTS OF DUE PROCESS. AND CONFIRM THE POLITICAL RIGHT OF INFLUENTIAL BUSINESSES AND LAW FIRMS IN SANTA CLARA COUNTY TO MANIPULATE THE SIXTH APPELLATE COURT TO QUASH DISSENTING OPINIONS PEACEFULLY PUBLISHED BY FALSELY OBTAINING INJUNCTIONS WITHOUT A PROPER SHOWING OF IRREPARABLE HARM AND WHILE HAVING SUFFICIENT ALTERNATE REMEDY AT LAW.

II. THIS ORDER IS AN ABUSE OF DISCRETION AND VIOLATES THE STATUTORY REQUIREMENTS OF CALIFORNIA CIVIL PROCEDURE 529 WHICH MANDATES THE COURT TO REQUIRE AN UNDERTAKING ON THE PART OF THE SUCCESSFUL APPLICANT FOR INJUNCTIVE RELIEF.

III. IN A PRIOR SIXTH APPELATE COURT RULING A REQUEST FOR CLARIFICATION OF THE PRELIMINARY INJUNCTION ORDERS WAS DENIED AND ORDERED BY THE SIXTH APPELLATE COURT TO BE CLARIFIED AT THE TIME OF THE INJUNCTION RULING NOW BEING REVIEWED. THIS CLARIFICATION OF THE INCONSISTENT ORDERS DID NOT OCCUR AND HAVE LEFT THE ORDERS VIOLATING THE PETITIONERS' FOURTEENTH AMENDMENT RIGHTS OF DUE PROCESS.

TABLE OF CONTENTS

PAGE NUMBER

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE PETITION.....10

CONCLUSION.....30

INDEX TO APPENDICES

APPENDIX A — Decision of State Court of Appeals

APPENDIX B1 — Decision of State Trial Court

APPENDIX B2 — Decision of State Trial Court

APPENDIX C — Decision of State Supreme Court
Denying Review

APPENDIX D — Decision of State Court of Appeals
Clarification of preliminary injunction orders
Is deferred and shall be considered with the
appeal on its merits.

APPENDIX E — Order of State Trial Court on
Defendants Summary Judgement Motion

TABLE OF AUTHORITIES CITED

CASE PAGE NUMBER

1. ABBA Rubber Co. v. Seaquist, (1991)
235 Cal. App.3d 1, 10.....25,27

2. Carroll v. Princess Anne, (1968)
393 U.S. 175, 181.....15

3. City of South San Francisco v. Cypress Lawn
Cemetery Ass'n, (1992) 1 Cal.App.4th 916, 920.....25

4. Gilbert v. National Enquirer. Inc., (1996)
43 Cal.App. 4th 1135, 1144.....15

5. Jackson v. State Bar (1979)
23 Cal. 3d. 509,513,153 Cal Rptr. 24, 591P.2d 47] ...23

6. Jensen V. Keystone Savings & Loan Assn. (1983)
142 Cal.App.3d 454.....12

7. Mangini v. J.G. Durand International (1994)
31 Cal.App.4th 214, 217.....25,27

8. Marriage of Van Hook, (1983)
147 Cal.App.3d 970,989 27

9. Miller v. Santa Margarita Land etc. Co., (1963)
217 Cal.App.2d 764, 766.....27

10. Near v. Minnesota (1931) 283 U.S. 607.
.....14,15

11. Nebraska Press Assn. V. Stuart (1976)
427 U.S. 539, 559].....14

12. Organization for a Better Austin v. Keefe, (1971)
U.S. 415, 419.....15

13. Robbins v. Superior Court (1985)
38 Cal.3d 199, 206.....19

14. San Francisco Newspaper Printing Co. v.
Superior Court (1985) 170 Cal. App. 3d 438, 442.....19

15. Southern promotion, Ltd. v. Conrad (1975)
420 U.S. 546, 558-559.....14

16. Southern Promotions, Ltd. V. Conrad, (1975)
420 U.S. 546, 558-559 15

STATUTES AND RULES

First Amendment to the United States Constitution.....1
Fourteenth Amendment, Section One,
to the United States Constitution.....1
28 U.S.C.§ 1257(a). State courts; certiorari 1,2
California Civil Procedure § 529 (a) (b) 2,24,25,26
California Civil Procedure § 995.240 26
California Civil Procedure § 1714.10..... 9,10
California State Bar, Rule 5-200(b)..... 23
Business & Professional Code, Section 17538.....26

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California appears at Appendix "C" to the petition and is unpublished.

The opinion of the California Appeals Court, Sixth District, appears at Appendix "A" to the petition and is unpublished.

JURISDICTION

Supreme Court for the State of California on October 14, 1998, denied Petitioners petition for review with the indication of " Mosk J. , is of the opinion the petition should be granted." A copy of that decision appears at Appendix "C".

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

The First Amendment of the United States Constitution states:

> "Congress shall make no law respecting an establishment or religion, prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, Section One, to the United States Constitution.

The Fourteenth Amendment of the United States Constitution, section one, states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. 1257(a), State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a stature of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Civil Procedure 529

(a) On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. Within five days after the service of the injunction, the person enjoined may object to the undertaking. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed with the time required by statute, the order granting the injunction must be dissolved.

STATEMENT OF THE CASE

Petitioners hereby petitions for review of the Supreme Court of the State Of California's denial to review the petitioners petition for the Court of Appeal of the State of California, Sixth Appellate District decision that was filed in this action on June 16, 1998, affirming two separate Preliminary Injunction Orders issued by the Superior Court which violate the First Amendment Rights and the Fourteenth Amendment Rights of the Petitioners regarding the publication of the "Do You Know The Truth Newsletter." The orders in question grant preliminary injunctive relief to respondents Silicon Valley Bank, John Dean, Roger Smith, Robert Gionfriddo, Sherry Stevens, Robert McMillan, and Marc Cadieux (refer to Exhibit "B1") and from a secondary and conflicting order granting relief to additional respondents, Backstrom & Neal, Robert Daney, and Michael Spence (Refer to Exhibit "B2").[1]

It should be noted, preliminarily, that Petitioners do not question the right of a Trial Court to issue an injunction, which may have some rational time, manner and place restrictions on speech. What is at issue is the fact that the orders in question first, were procured in violation of statutorily mandated requirement of the posting of an undertaking. Second, the language of the two orders is so over broad that it clearly violates

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[1] On October 29, 1996 Defendants Backstrom & Neal Motion for preliminary Injunction was at bar and there were no other motion on file or at bar for in regard to the Silicon valley bank defendants request for Injunction.

Petitioners' First Amendment rights, by it's prior restraint on speech and the content of that speech, and their Fourteenth Amendment rights to due process by barring and severely blocking certain forms of discovery and limiting access to public support. Third, the injunctive orders were issued without proper showing of irreparable harm by any of the respondents and the respondents had a sufficient alternate remedy at law. Fourth, On October 29, 1996 hearing the motion at bar was only for the defendants Backstrom & Neal, Robert Daney and Mike Spence[2] yet the court ruled to include all defendants and defendants' attorneys.

On October 29, 1996 the court issued an order which not only concerned the request for injunctive relief of the defendants Backstrom and Neal but issued an over broad injunction order covering the Silicon Valley Bank defendants, their attorneys, and past and present employees and their associates without their request or their motion being before bar.[3]

In addition, these injunctions were previously heard by a different judge, the Honorable M. J. Levinger under Santa Clara County Superior Court, Case No. 751228 in the Superior Court in August, 1995, and denied as being in violation of Petitioners' First Amendment Rights. The content of the newsletter had not materially changed since that injunction hearing. Thus, these injunctions should never have been issued based upon a second hearing regarding the same issue. The question here is whether SVB Respondents and B&N Respondents lawfully obtained an injunction in this case: The answer is simple, **they did not**.

On July 17, 1998 the Petitioner's attorney who has represented them since June, 1997 petitioned the court to withdraw from the case. The reasons given were the financial hardship the burden of this case is bring on the attorney and his firm and his inability to proceed effectively because

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2) Defendants' Backstrom and Neal Robert Daney and Mike Spence on October 29, 1996 did not answer the complaint and had a motion on file for demurrer to petitioners' complaint. Further, it should be noted that as of this petition, Defendants Backstrom & Neal, Robert Daney and Michael Spence have not filed any cross complaint nor is there a request for permanent injunctions from them.

3) A bench order was issued by the Trial Court on October 29, 1996 at the time of the Backstrom & Neal Preliminary Injunction hearing. Between October 29, 1996 and the actual issuance of the order over 130 days later on March 14, 1997 the order was lost by the Trial Court, the order was delayed by Backstrom & Neal's attorney, Mr. Claypool's inability to obtain a copy of the transcript for close to a month (So the written order could match the bench order), and all case Files were lost by the court at one point. The second order for the SVB Preliminary Injunction was heard on November 12, 1996 and the order was issued on December 18, 1996. To summarize these events the court was reluctant to issue the conflicting order.

of it. For this reason the Petitioners are representing themselves *In Propria Persona.*

The issues now pending review stem from a long series of actions between the Petitioners and the Respondents. Due to the selected nature of the facts presented and other misrepresentations presented in the Factual Background of the Appeals Court's Order (Refer to Exhibit "A") a complete history of relevant facts related to this injunctive action is presented below.

1. HISTORY

The issue is very simple. Petitioners stood so as not to become the "escape-goat" of a very prominent Bank in Silicon Valley who was under FDIC review and certain individuals unlawful activities. Petitioners challenged these unscrupulous practices through the court system. The prominent Bank's Law firm not only used their influence to manipulate the court system, but further, they used their local newspaper to "character bash" us.

After the Bank and its Law Firm published a very slanderous article in the San Jose Business Journal regarding us and the Bank and its Law Firm used their influence on the judicial system, Petitioners stood up and exercised our First Amendment rights. Petitioners began to publish our opposing opinions and started a publication. Petitioners very peacefully distributed and published our opinions regarding the true facts surrounding these issues in our newsletter, "Do You Know The Truth Newsletter".

The Law Firm in order to hide how they had obstructed justice and through the use of their influence in the local area and in the courts, obtained an injunction against our publication. However, the political influences were so strong that the Injunctions were written such that they violated our Fourteenth Amendment rights to due process as well as our First Amendment rights. Petitioners have been barred from doing certain forms of discovery. The court system has acknowledged that this has occurred and has knowingly allowed it to happen.

What is important here is that the Law Firm under the watchful eye and approval of the courts is allowed to so openly and freely violate the law. The political shock to the local community of our publishing this newsletter and voicing our opinion has had such broad reaching impact that the court system would knowingly allowing the Bank's Law Firm to victimize us through the court system.

For what reason? Just because Petitioners stood up to not become the "escape goat" for the Bank's irregular activities while the FDIC was investigating them. SVB Defendants' Counsel's manufacturing, misrepresentation and bending of facts is a true measure of the reality of this case. Petitioners worked for a company known as USM Technology,

Inc. (herein after referred to as "USM"). This company had a banking relationship with Silicon Valley Bank (herein after referred to as "SVB") beginning in late 1990 and grew to the point where all of USM's banking business was performed by SVB by June of 1991.

In mid 1991, conflicts began to develop between USM and Robert McMillan of SVB. After a series of irregular and wrongful actions by McMillan, USM requested that he be removed from the account. The President of SVB, Roger Smith, directed that McMillan be replaced on the account by another banking officer. It was later discovered that McMillan's actions were to cover up the bank's fraudulent loan activity.

Unfortunately, the conflicts with the Bank increased, rather than decreased.

During this same time period the Petitioners' were contracted to sell USM for the asking price of between five and seven million dollars. The Petitioners would receive a guaranteed payment of $800,000.00 for Mr. Ruebusch and $300,000.00 for Mr. Kabir. With the information of USM's sale to Wyle Laboratories being communicated to SVB, Bank personnel, including Mr. McMillan, began to urge the majority owner of USM to terminate the Petitioners from their employment at USM.

While working to finish the sale of USM to Wyle Laboratories, in early February, 1992, Mr. Ruebusch discovered and voluntarily went to SVB to report that the majority owner of USM was either diverting corporate funds or withholding funds from deposit on the Bank in violation of the Bank loan agreements. This disclosure prompted a meeting the next day at USM. At this meeting, the majority owner of USM admitted that he was withholding funds from the bank and the banking officer, Mr. McMillan admitted he was aware of this action and concurred with it.

A couple of days before this meeting, Petitioner, Mr. Kabir, had been terminated by USM. Within a week of this meeting, the Petitioner, Mr. Ruebusch was also terminated from USM. False accusations were made that both Petitioner and Mr. Ruebusch have committed wrongful acts. The day Mr. Ruebusch was terminated, Silicon Valley Bank's agent, Won Choe, took charge of the Company and allowed Mr. Yun the 60 % owner to take the companies account receivable checks including a $145000, check drawn as cash from the company.

In March of 1992, Petitioners filed the first of several actions against the main respondent, Silicon Valley Bank (herein after referred to as "SVB"), claiming interference with employment contract based upon religious discrimination.

In April of 1992, in an attempt to discourage the Petitioners from proceeding with their action as well as lay the ground work for the size of the influence barrier both Petitioners and their legal counsel would be

facing in the San Jose political arena, a very slanderous full page article appeared in the local "San Jose Business Journal" newspaper. In this article many bank officers of Silicon Valley Bank as well as purported agents of the Bank described in very damaging and slanderous detail how the Petitioners were involved in 'criminal activity' as well as other slanderous and damaging issues regarding their employment at a Company called USM Technology, Inc. The Hopkins & Carley Law Firm, which represents Silicon Valley Bank also, represents the San Jose Business Journal in the San Jose community. Further, Silicon Valley Bank was and still is a very prominent and influential Bank in the San Jose community.

Contrary to the intended impact and as a result of the newspaper article, the existing suit was amended to include defamation claims to which Petitioner, Mr. Ruebusch prevailed at trial.

After the assets of USM were squandered and looted from February of 1992 to September of 1992, while under the direction of SVB agent, Won Choe, USM filed for Chapter 11 bankruptcy protection in September of 1992 and SVB forced it to file Chapter 7 within fifteen days. In response to this action in September of 1992, SVB filed a Cross-Complaint for fraud against the Petitioners. Petitioner, Mr. Kabir carried the title of CFO at USM through January 1992, but had no cash signatory responsibility and Petitioner, Mr. Ruebusch, was the President through mid February 1992 and 10% owner of USM with signatory responsibility up to $2,000.00 individually.

In the fourth quarter 1992, the FDIC took over management control of SVB for charges similar to those being made by Petitioners in the their underlying case. At the end of this period, December 1992, the President and CEO of SVB, Roger Smith was removed from this position, as was the COO of SVB, J. Kerins, removed from his position.

During the course of discovery, in late 1994, when the respondent SVB produced bank documents and certain depositional testimony was taken, the Petitioners found highly irregular and fraudulent banking activity. Unbeknownst to their employer USM Technology, Inc. and the Petitioners, SVB and its banking officers had created an additional $1,000,000.00 (one million-dollar), line of credit under the corporate name as well as a $180,000.00 term loan[4]. Further it was discovered that a local CPA, who had been fired by USM Technology, Inc. for taking its direction from SVB and not from the Company, had produced fraudulent financial statements on the Company for SVB after it was no longer associated with

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[4]) In depositional testimony in June 1998 the existence of these fraudulent and irregular loans was acknowledged and confirmed by the then CEO and President of Silicon Valley Bank, Roger Smith, who was on the credit committee that approved the loans.

USM. It is the cover up of these confirmed irregular and fraudulent activities which are alleged to be the reason behind the vicious attack by SVB on USM Technology, Inc. and the Petitioners.

As a result of the Petitioners' attorney being unable to financially proceed with the prosecution of SVB's and its associate's alleged newly discovered fraud and the trial date having already been set within six months from the discovery of the fraud, for April 3, 1995, the first law suit was not amended.

During the pretrial mandatory settlement conference held on March 29, 1995 the Plaintiff's knowledge of SVB's alleged fraudulent activities was disclosed. This disclosure moved the respondent SVB closer to settlement. However, the issue was not resolved. On opening day of trial, April 3, 1995, the lead attorney Stephen Kottmeier representing SVB from Hopkins & Carley Law Firm, asked for a continuance of the trial because one of his back up attorneys involved in the case from their firm had developed a heart related issue. The court granted the continuance and the trial date was tentatively rescheduled for August 28, 1995.

In mid July 1995, with the Petitioners exercising their First Amendment rights and responding to the slanderous newspaper article from 1992, they began to voice their opinion regarding the fraudulent banking practices of SVB, the way a local CPA firm, Backstrom & Neal, supported their practices, their law firm, Hopkins & Carley Law Firm, directed their practices and the local community supported these practices. The Petitioners began to peacefully publish the subject of this injunctive relief as well as other court documents from the case, in the "Do You Know The Truth Newsletter" through mail, fax and handing out newsletters on street corners.

With in several days of the Plaintiffs publishing the "Do You Know The Truth Newsletter" the Respondent, Silicon Valley Bank, filed an independent law suit against the Plaintiffs for slander and requested injunctive relief. A temporary restraining order similar to these now before the court regarding the publication of the newsletter was denied based upon the First Amendment rights issues guaranteed under United States and California Constitutions by the Superior Court of Santa Clara County, Judge Levinger, in early August of 1995. However, not satisfied with this ruling, the SVB respondents filed the current injunctions, now the subject of this action, attempting an "end around maneuver" to manipulate the courts into re-ruling on the injunctions they had already ruled upon.

The Petitioners continued to publish their newsletter displaying the documents, which had been disclosed to them which clearly depicted the alleged fraudulent banking practices and the political support SVB was receiving from the local legal community.

By the trial date of August 28, 1995, eleven issues were published. Prior to the beginning of the trial, a hearing trumped up by SVB regarding an alleged violation by Petitioners of the temporary restraining order, in the seven days it existed, was heard by Superior Court Judge the Honorable John Herlihy. During this hearing it was obvious to all including the judge that there were no grounds for the hearing. However, due to the political issues stirred up in San Jose surrounding the newsletter the Judge held the hearing and took the opportunity to voice his biased nature towards the Petitioners. Judge Herlihy demonstrated this bias when he informed Petitioner by slurring his ethnic background, Mr. Kabir, that "this is America and we do things differently here". He ordered that the Petitioners were not to publish their newsletter during the trial, to which the Petitioners complied.

The results of the trial were that Petitioner, Mr. Ruebusch, was awarded $80,000.00 as a result of the slander against him made by SVB and he prevailed against the SVB cross complaint for fraud. Petitioner, Mr. Kabir, prevailed against the SVB cross complaint for fraud but lost his action against the bank for slander.

Upon completion of the trial, the Respondents continued to press their secondary action for slander and the Petitioners continued to publish their newsletter displaying the bank documents, which showed the bank's fraud. On February 29, 1996, while Petitioners continued to publish their newsletter and three days prior to scheduled depositional testimony of the prior CEO of SVB, the bank's slander suit was dismissed without prejudice. This information was conspicuously left out of the statement of facts presented in the Appeals Court Order and bears directly to the SVB claims of damages. If there were damages, why would Silicon Valley Bank drop the lawsuit?

The Appeals Court Order stated that the cross complaint for defamation, other damages and the permanent injunction was filed on September 16, 1996. All be it true, it grossly misrepresents the fact that this cross complaint was the prior lawsuit which had been dropped and now been re-resurrected to give SVB a financial advantage on the Petitioners in the legal system. Further, the injunctions had been ruled upon in the prior case under Honorable Judge Levinger in August of 1995. By resurrecting the same suit Respondents again went back to the court for a second ruling on the same injunctive relief. Additionally, the Appeals Court failed to point out that the prior suit was dismissed due to no economic gain being associated with SVB pursuing the case. This is one of the many facts in direct contradiction to the Appeals Court decision that damages were undeterminable and extensive in their eyes for the Respondents.

On page three of the order, the Appeals Court focuses half a page

discussing the allegations in support of the abuse of process and malicious prosecution cross complaint causes of action filed by SVB which has no bearing on the issue before the Court other than attempted character bashing. However, to set the record straight, the action which is the subject of these causes of action is the complaint Petitioners filed in *Propria Persona* without knowledge of the requirement under CCP 1714.10 to file a petition to the court to include the attorneys with the civil conspiracy of their clients. The court then dismissed the complaint without prejudice and instructed the Petitioners to refile through use of a petition. The Petitioners did and the complaint now standing today is that complaint. If anyone were to have the right to file abuse of process or malicious prosecution it would be Hopkins & Carley Law Firm, not SVB, since a CCP 1714.10 petition is directed at the lawyers conspiring with the client. The Law Firm has failed to do so, however, through their manipulation of evidence it would appear that through their client they are pursuing the Petitioners. These issues remain to be heard at trial in the future and are not part of the Injunction Hearing regardless of the character issues the Appeals Court attempted to raise in their Order. However, the pretrial ruling by the Appellate Court on this non related issue does lend further support to the biased and discriminatory demeanor of the Appeals Court regarding this issue.

After over fifteen months and over forty issues had been published the respondents SVB, John Dean, Roger Smith, Robert Gionfriddo, Sherry Stevens, Marc Cadieux, and Robert McMillan filed an application for Preliminary Injunctive relief on October 16, 1996. In the same month respondents Backstrom & Neal, Robert Daney, and Michael Spence filed for a temporary restraining order. In the fifteen plus months that the "Do You Know The Truth Newsletter" was published none of the respondents ever contacted the Petitioners and requested them to remove them from the distribution lists when the newsletter clearly printed on each page the address of the publication. For that matter, in the fifteen months of publication prior to being restrained, only one person requested his name be removed from the distribution list, to which the Petitioners complied.

For the six months prior to the injunctive orders being issued the Petitioners were involved in filing a California Civil Procedures 1714.10 petition involving attorneys conspiracy with client., The Petitioners were representing themselves *In Propria Persona* and the content of the newsletters mainly focused around printing the motion arguments and the resulting orders of the court proceedings involved in the CCP 1714.10 hearings. As will be shown in the Discussion portion of this document regarding the questionable practice of obtaining declarations, the attorneys in this action personally took on this case based upon the Petitioners' filing

a CCP 1714.10 action against them and with the financial strength of their client have manipulate the court.

The orders were signed for the Preliminary Injunctions[5] on December 18, 1996 for the SVB respondents and on March 14, 1997 for the Backstrom & Neal respondents.

On June 16, 1998, the Non Published Court of Appeal's order and opinion was filed by the court (Refer to Exhibit "A"). The Sixth Appellate District Court for the State of California denied the appeal.

A petition for review was file with the California Supreme Court for the State of California on August 28, 1998. After accepting opposing arguments and the appropriate reply, on October 14, 1998 the Appellants' petition for review was

"denied with Mosk, J., is of the opinion the petition should be granted." (Exhibit "C")

The argument presented the statutory requirements for the issuance of a preliminary injunction and how the Superior Court and the Appeals Court had ignored these requirements and further, that the declarations issued to support said injunctions were falsified. In these times this behavior should be dealt with severely.

REASONS FOR GRANTING THIS PETITION

This Petition raises the question of equal protection under the law and due process for the rights of Citizens of the United States. It addresses the issue of how an injunction issued in the California civil courts resulted in an unwarranted violation of citizens' First Amendment constitutional right to freedom of speech and lead to due process violations of the Fourteenth Amendment.

The actual effect of the issuance of two preliminary injunctions at the onset of the Petitioners' litigation was for the political environment of Santa Clara, California, through the Superior Court, to strip the litigants who filed their case *In Propria Persona* of all meaningful access to legal representation. The discriminatory punishment inflicted after a year and a half and over 40 issues being published upon the Petitioners by quashing their First Amendment right to publish the "Do You Know The Truth Newsletter" in the first 90 days of the litigation was wrong. To not only

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[5]) A bench order was issued by the Trial Court on October 29, 1996 at the time of the Backstrom & Neal Preliminary Injunction hearing. Between October 29, 1996 and the actual issuance of the order over 130 days later on March 14, 1997 the order was lost by the Trial Court, the order was delayed by Backstrom & Neal's attorney, Mr. Claypool's inability to obtain a copy of the transcript for close to a month (So the written order could match the bench order), and all case files were lost by the court at one point. The second order for the SVB Preliminary Injunction was heard on November 12, 1996 and the order was issued on December 18, 1996. To summarize these events the court was reluctant to issue the conflicting order.

wrong the Petitioners through the removal of a key Constitutional right but to irreparably harm their litigation capabilities by violating their Fourteenth Amendment rights is a further wrong. To bar the Petitioners from their right to contact key witnesses through these injunctions is a continuation of these wrongs.

For the California court system to allow a ruling to stand which violates the statutory law of the State of California is something which needs to be addressed but it becomes an issue worthy of the United States Supreme Court when those issues abandoned are the backbone of the Constitution. That being the First Amendment right of freedom of speech and the Fourteenth Amendment right of equal access to justice.

This issue must be addressed so as not to allow the court systems to be used by the powerful wealthy few as a platform for quashing dissenting opinions and stripping citizens of their equal access to justice. In order to preserve the most meaningful access to the government and democracy that the ordinary citizen has, the court system must address the issues presented in this petition. This petition affects all people.

I.

ISSUE FOR REVIEW

IF THIS ORDER IS ALLOWED TO STAND NOT ONLY WILL THE FIRST AMENDMENT RIGHTS OF PETITIONERS, GUARANTEED UNDER THE UNITED STATES CONSTITUTION BE VIOLATED, BUT IT WILL CONFIRM THE POLITICAL RIGHT OF INFLUENTIAL BUSINESSES AND LAW FIRMS IN SANTA CLARA COUNTY, CALIFORNIA, TO MANIPULATE THE SIXTH APPELLATE COURT TO QUASH DISSENTING OPINIONS PEACEFULLY PUBLISHED BY FALSELY OBTAINING INJUNCTIONS WITHOUT A PROPER SHOWING OF IRREPARABLE HARM AND WHILE HAVING SUFFICIENT ALTERNATE REMEDY AT LAW.

This political issue in Santa Clara County has been percolating in the judicial system since 1992 and, although the issues surrounding the very influential respondent's, Silicon Valley Bank's, fraud are complex, one issue is clear, every effort possible has been exercised by respondents to use their financial strength to block the true facts and merits of the case from reaching the public arena where concerned professionals may assist in ending such disturbing practices.

As the citizen of this land, Petitioners have the right to bring to the public, information related to potentially damaging banking practices, such as the ones in question here. The facts of this case are centered around the fraud of a federally chartered bank and how the community surrounding it support the cover up of their highly irregular practices which went so far as to require FDIC involvement. This is definitely a public issue that concerns all taxpayers who pay for the "bail out" of failing banks and savings and loans. In so doing, and in publishing their

opinion of what public documents disclosed, Petitioners were exercising their First Amendment Right of Free Speech. The majority of the content of the "Do You Know The Truth Newsletter" was a republication and distribution of essential public documents surrounding the Respondent bank's highly irregular actions. Anyone had and still does have access to them. The injunctions have cut off the Petitioners from the public support, which they were receiving from the professional community. This support was critical to Petitioners.

In addition, for an injunction to be valid the respondents must have a proper showing of irreparable harm and have no sufficient alternate remedy at law. SVB Respondents are currently pursing an action for defamation and abuse of process against Petitioners herein. Whatever the merits of such an action maybe, it is clear that an adequate remedy at law exists and that SVB Respondents are fully utilizing it now. "If there is an adequate remedy at law an injunction is not to issue. [*Jensen V. Keystone Savings & Loan Assn.* (1983)142 Cal.App.3d 454]. In this case SVB Respondents have filed a lawsuit seeking monetary damages for the allegedly defamatory statements and thus have a sufficient alternate remedy at law. The respondents, therefore, are not entitled to an order, which clearly imposes a prior restraint on speech, in violation of both the United States and California Constitutions.

The Sixth Appellate Court far exceeded their jurisdictional rights when they ruled for judicial convenience as to truth of the facts presented regarding the damages sustained by both sides in order to support their predetermined ruling. The backbone of the Appellate decision is the respondents self serving declarations regarding damages and the fact that the Petitioners were held to a different level of proof as to damages than were the Respondents. Further, newly acquired depositional testimony shows the declarations relied upon by the Appeals Court were false. The Appellate Court went so far as to show their intentional nature of their mind set when they sarcastically state "To the contrary, they (Petitioners) undoubtedly will save money." (Page 18 of Sixth Appellate Court Ruling dated June 16, 1998).

Finally, the Sixth Appellate Court ignored the fact that the complaint[6] in this case, filed by Petitioners, pleads the causes of action to

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[6] Respondents lost their Summary Judgment (Exhibit "E") motion in April, 1997 and the Court ruled in a five page opinion (continued)
that all defendants and the following causes of action would proceed for trial: 1) Fraud, 2) Fraudulent Concealment 3) Deceit, 4) Conspiracy To Defraud 5) Intentional Interference With Economic Relationship. During this review hundreds of pages of evidence were filed by Petitioners in support of allegations pleaded to which the court ruled in favor of Petitioners and denied the summary judgment.

prove the fraud of SVB and has survived three demur hearings by respondents and one summary judgment (Exhibit "E") filing. The allegations in the underling case are the factual support for the content of the newsletters to which the Appeals Court chose to ignore and way the facts in favor of the Defendants.

The practical matter is the Courts guard the First Amendment rights of the citizens of the United States and should not, as the Appeals Court has done in this case, selectively choose to weigh certain issues, misstate other issues and ignore completely other key issues. In effect, stretch for arbitrary ways to quash dissenting views against their politically influential associates. The thirty-two-page opinion, is nothing more than opinions on their truth of selected facts, which they needed to reach their predetermined political opinion.

The center pin which most clearly depicts the mindset for the judicial error of the Sixth Appellate Court regarding the First Amendment Rights violation in this case is the Court's unfounded and biased belief stated in their opinion regarding the purpose behind the need for an Injunction. They state on page 25 of their opinion enclosed as Exhibit "A",

> "The injunctive relief in the present case is designed to curtail the tortious and unlawful conduct of appellants in continuously publishing specific statements, contained in a newsletter, which have been found by trial to be false."

There has not been any court that has ruled on the truth or falsity of the statements in the Petitioners' newsletters. Further, there is an ongoing case that has passed an extensive summary judgment (Exhibit "E") review as well as three demurrer hearings and is now active before the Superior Court. Finally, what tortuous and unlawful conduct is the Court referring to? There has been no hearing or trial regarding tortuous and unlawful conduct. This opinion is a shame based upon the politics of a local community and the predetermined mindset of the court perpetrated by influence peddling and manipulation of evidence and therefore this review is warranted.

A. This Petition Needs To Be Granted To Secure The Settlement Of An Important Question Of Law.

As quoted in the Petition, "The United States Supreme Court has held that prior restraint on free speech and publications are the most serious and the least tolerable infringement on First Amendment rights." [*Nebraska Press Assn. V. Stuart* (1976) 427 U.S. 539, 559] and in [*Southern promotion, Ltd. v. Conrad* (1975) 420 U.S. 546, 558-559] (the presumption against prior restraints is heavier, and the degree of protection broader, than against limits on expression imposed by criminal penalties.)

There is no more important issue of law than the First Amendment rights of the citizens of the United States.

The SVB Defendants' argument that the orders were narrowly tailored and were in regard to a private issue is erroneous. As pointed out in section 4 of this document, these orders are so over broad that they are causing unwarranted material prejudicial permutations in the discovery process for Petitioners and violating their Fourteenth Amendment rights. Further, the purpose of the injunctions is to keep the very public issue of major Bank irregularities, private and away from the public and professional community. Thus the injunctions effectively quash all information reaching the public and maintain the local political balance for a very influential bank and the obstructionist practices of their legal firm, Hopkins & Carley, whose practices would be of major public concern if known. Thus through a self-fulfilling prophecy the injunctions make a very public issue become a "private" issue and in the process violate the First Amendment and Fourteenth Amendment rights of the Petitioners.

Finally, these injunctions were already heard by the Superior Court in August 1995 and denied as being in violation of Petitioners' First Amendment Rights. The content of the newsletter has not materially changed since that injunction hearing was heard. These injunctions should never have been issued based upon a second hearing regarding the same issue.

1. It Is Judicial Error For The Appeals Court To Rule Based Upon Their Predetermined Opinion That The Contents Of The "Do You Know The Truth Newsletter" Are False.

The United States Supreme Court has held that prior restraints on free speech and publications are the most serious and the least tolerable infringement on First Amendment rights. [*Nebraska Press Assn. V. Stuart* (1976) 427 U.S. 539, 559.] In article I, Section 2, subdivision (a), the California Constitution provides that "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge the liberty of speech or press." Further, these rights are safeguarded against state interference by the due process clause of the Fourteenth Amendment.

The chief purpose of the First Amendment is to prohibit prior restraint upon the freedom of speech and of the press. [*Near v. Minnesota* (1931) 283 U.S. 607.] Additionally, it has been consistently held that any prior restraint on expression bears a heavy presumption against its constitutional validity. [*Organization for a Better Austin v. Keefe*, (1971) U.S. 415, 419, citing *Carroll v. Princess Anne,* (1968) 393 U.S. 175, 181] In fact the presumption against prior restrains is heavier, and the degree of protection broader, than that against limits on expression imposed by

criminal penalties. [*Southern Promotions, Ltd. V. Conrad*, (1975) 420 U.S. 546, 558-559]. In *Organization for a Better Austin*, the petitioners were enjoined from distributing pamphlets, leaflets or literature of any kind. In reversing the injunction on first amendment grounds, the Supreme Court wrote that:

> It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restrain on speech and publication, constitutes an impermissible restraint on First Amendment rights.

402 U.S. at 418. The court also wrote, "peaceful pamphleteering is a form of communication protected by the First Amendment" *Id.*

There can be no doubt that the preliminary injunctions now before the court sub judice constitute prior restraint on publication and speech. As was stated in the Petitioners' opening brief of July 16, 1997 to the Appellate Court, the Backstrom & Neal Order enjoins and restrains the plaintiffs from "the dissemination of documents or otherwise publishing information to anyone other than their counsel of record or between themselves...." (Refer to Appendix "B") Similarly, the SVB Order precludes the plaintiffs from "[d]isseminating documents or otherwise making statements to anyone other than their counsel of record herein or during proceedings before this court. . ." (Refer to Appendix "B") These orders are inconsistent with each other and impinge upon the Petitioners' First Amendment fights and Fourteenth Amendment rights by denying them freedom of speech and by so doing, due process in the courts.

In the present case, the Petitioners action fall squarely within the protection of the guarantees of free speech afforded by the federal and state constitutions. Similar to the petitioners in *Organization for a Better Austin*, Petitioners herein were openly and vigorously defending themselves and making the public aware of what they perceived were wrongs inflicted upon them by the respondents. 402 U.S. at 419. Indeed, while the determination of whether the statements made by the plaintiffs are actually defamatory will be made at the conclusion of their trial, such self serving claims by the respondents to which the Appeals Court based their opinion herein are insufficient to warrant the use of the court's injunctive power. *Id.* As was written by the Court of Appeal in [*Gilbert v. National Enquirer. Inc.*, (1996) 43 Cal.App. 4th 1135, 1144, "The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the specter of censorship in a most pernicious form" quoting *Wilson*, 13 Cal.3d at 659.

In this case the Appeals Court was inconsistent and erred when

they relied upon the cleverly worded declarations of the respondents John Dean, Marc Cadieux, Robert Gionfriddo, Sherry Stevens, and even go so far as to quote the legal counsel, Steven Kottmeier of Hopkins & Carley Law Firm, as a witness. By the Appeals Court ruling on the truth of the statements when the logic of the case before them contradicts this approach and this approach is inconsistent with existing case law is a fatal error. The declarant Marc Cadieux was quoted in the order (Refer to Exhibit "A", page 6) that "he was responsible for monitoring and supervising SVB's efforts to collect on loans defaulted by USM." He goes on to say, "All of the statements it (the newsletter) contained were false." and "...he was not aware of any instance in which SVB committed fraud in its relationship with USM or anyone affiliated with it." For the Appeals Court to rely upon the truth of these statements and other statements similar to this in their ruling, is contradictory to the Trial Court ruling which denied the Respondents' summary judgment (Exhibit "E"). In the worst case regarding the issue of fraud, the court ruled there were triable issues of fact, which were supported by evidence, to be resolved in court. To ignore this issue and capriciously determine that this selected information is truthful is judicial error.

2. The Respondents' Declarations, Relied Upon By The Appellate Court, Prove To Be False When Witnesses Depositions Are Taken.

The declarations by the respondents in this action in support of the injunctions are the backbone of the Appeals Court decision. As discussed above these declarations were erroneously ruled to be truthful by the Appeals Court. Further, testimony of the current President and CEO of SVB, John Dean, reveals that the declarations were fabricated and discloses an even more insidious manipulation of the court. The Appeals Court relied, in their opinion, (Refer to page 7, Exhibit "A") on John Dean's Declaration In Support Of The Preliminary Injunctions when they quote him:

> "Potential customers, business referral sources and other members of the business community had approached him to inquire about the newsletters. He had been placed in a position of having to explain the falsity of the newsletter's content. The barrage of newsletters throughout the community had the potential of detrimentally impacting SVB's business, although it would be difficult to quantify the damages caused by the defamatory statements."

The opposite turns out to be true. On December 1, 1997, in depositional testimony John Dean declared quite the contrary and revealed the methodology in which this evidence was erroneously gathered. On page 143 of John Deans' testimony in the current case while being

questioned by Petitioners' attorneys Zucca and Yanez, Mr. Dean states:

Question: Other than board members of Silicon Valley Bank and officers or employees of Silicon Valley Bank, are you aware of anyone else that received the newsletters?

Mr. Dean : Not that I recall.

Question: Other than the conversations which we've already discussed were you contacted by anyone regarding the allegations in the newsletters?

Mr. Dean : In terms of phone calls or any kind of correspondence?

Question: Any type?

Mr. Dean : Not that I recall.

Question: Were you contacted by any customers of Silicon Valley Bank regarding receipt or contents of the newsletter?

Mr. Dean : Boy, not that I recall.

Question: Were you contacted by any of your colleagues in the banking industry regarding receipt or the contents of the newsletter?

Mr. Dean : What do you mean by colleagues?

ATTORNEY KOTTMEIER: You mean people outside Silicon Valley Bank?

ATTORNEY ZUCCA: That's correct.

ATTORNEY KOTTMEIER: Bank presidents or - - - - - - -

Mr. Dean : No, not that I recall.

Further, on page 159, line 5, John Dean testifies as to

Question: ....are you aware of any business lost by the bank as a result of the dissemination of the newsletter?

Mr. Dean : I'm not aware.

It is clear that Mr. Dean, the CEO and President of Silicon Valley Bank never had any contact with customers or members of the banking community or for that matter anyone outside of employees and board members of SVB regarding the newsletter. Further, it is clear that the President and CEO of SVB has no knowledge of lost business as a result of the newsletters. His declaration, which was instrumental in obtaining the Preliminary Injunctions, is false and purposefully filed to mislead the court. There were no damages. So where did his information come from? In the same depositional testimony on December 1, 1997, from page 175 through page 250 Mr. Dean stated over 40 times regarding his declarations filed with the court that he had virtually no personal knowledge of the declaration which he signed. Further, Mr. Dean's attorney from Hopkins & Carley Law Firm, Mr. Kottmeier answered the question where the information came from on page 178 and then on page 179 Mr. Dean

confirms this.

MR. YANEZ.:	Presumably he has no other personal knowledge other than what you (Mr. Kottmeier) gave to him; is that correct? So that we can kind of short circuit this, are you saying the only knowledge he has is knowledge he gained from his attorneys? He has no free-standing personal knowledge?
MR. KOTTMEIER:	To the extent he has some free-standing personal knowledge, I think he has already testified to that today.
MR. YANEZ:	He said I talked to my attorneys. You have instructed him not to answer most of these questions
MR. KOTTMEIER:	Right.
MR. YANEZ:	In other words, the only knowledge he has is information he got from his attorneys.
MR. KOTTMEIER:	The record shows.
Question:	Mr. Dean, what knowledge do you have other than what you gained from your attorneys that SVB committed no fraud against USM?
Mr. Dean :	Other than conversations with counsel regarding all these matters and letters going back and conversation which are over a period in time, I don't recall any conversations I had.
Question:	Aside from conversations, what other knowledge did you have that there was no fraud committed? And again, excluding you conversations as objected to by you counsel.
Mr. Dean :	Yes, I appreciate that. I wasn't aware of knowledge outside of that, outside of conversations with legal counsel.

The information presented in the declaration of the President and CEO of Silicon Valley Bank, John Dean, comes from his legal counsel. The insidious practice of the attorney writing a declaration and having his client sign it without any personal knowledge of the facts being declared is the method with which the evidence was obtained and to which the Appeals Court relied on in order to violate the Petitioners' First Amendment rights. Further, while being questioned, the witness stated several times the opposite of what the evidence presented in the Injunction hearings had stated that is that there were no damages.

On the other hand, the Respondents must show damages for the trial court

to grant an injunction. As evidenced above, while discussing the CEO and President of SVB's, John Dean's, deposition, the declarations of damages were manufactured to serve a need and justify a damage to the original trial court. However, these declarations have been proven to be false. Without these declarations the Respondents' case is without merit. Before the respondents are entitled to their injunctive relief, they have the burden of demonstrating to the court not only that they would suffer irreparable harm, which they haven't, but also that there was a reasonable probability that they would prevail on the merits at trial. [*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206]; [*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal. App. 3d 438, 442] Without these false declarations, the Respondent's case would fail.

This becomes even more suspect when the damages the Appeals Court wishes to consider are the self serving declaration of respondents which have been proven to be false. The question here is whether Respondents lawfully obtained an injunction. The answer is simple, they did not. Arguing as to what evidence will be necessary for the trial court to consider on the question of damages is not an issue for consideration by the Appeals Court much less that those declarations were manufactured.

As stated earlier, it was abuse of discretion for the Appeals Court to sarcastically throw aside the First Amendment rights of Petitioners when they stated "To the contrary, they (Petitioners) undoubtedly will save money" (Page 18 of Sixth Appellate Court Ruling dated June 16, 1998) by not publishing their opinions. As evidenced many times in this document again here, the Appellate Courts biased and discriminatory posture regarding this case is fatal to their opinion.

When the Appeals Court again abuses its discretion and unilaterally determines that a bank is a private entity, their opinion breaks down further. The facts of this case are centered around the fraud of a federally chartered bank and how the community surrounding it support the cover up of their highly irregular practices which went so far as to require FDIC involvement. This is definitely a public issue that concerns all taxpayers who pay for the "bail out" of failing banks and savings and loans. In the last half of the 1980s there was no more public concern than the failing savings and loans. How the Appeals Court can state a bank's fraudulent practices are private is astounding.

This issue of "no damages" declared by Mr. Dean during his December 1, 1997 deposition will carry over into the Second Issue on Review before this court.

This practice of preparing false declarations and having your client sign them was again documented in the depositional testimony of the prior President and CEO of SVB, Roger Smith, in depositional testimony in June and July 1998. In this testimony Mr. Smith declared he

also had no personal knowledge of the facts in his declaration. Mr. Smith's testimony has no bearing on this review and therefore is not included. However, the method of fabricating evidence is a continuing pattern of this case. This is another example of how evidence was manufactured. One of the declaration in support of the SVB defendants, the B&N Defendants and the Appeals Court Opinion (Petition, Exhibit "A") John Pfahnl, from Pfahnl & Hunt, CPA Firm states in his declaration in support of the summary judgment that under penalty of perjury that he " has personal and first hand Knowledge of the facts below.[ ]...2, Recently I received a newsletter by fax sent by a gentleman named Monem Kabir."

On December 8, 1998 Mr. Pfahnl under oath testified that " I had no first had Knowledge that it was from Mr. Kabir." Further, when Mr. Pfahnl was questioned was this declaration being prepared by you? Mr. Pfahnl answered "It was not being prepared by me."

In like manner, a declaration from a local businessman, Randy Cowherd, was produced as evidence. This declaration word for word is a copy of the John Pfahnl declaration, which has already been identified as a manufactured declaration. Thus making the Cowherd declaration highly suspect. At this time Plaintiffs are attempting to subpoena Cowherd and for that matter all witnesses who submitted a declaration but have been unable to serve him.

This type of testimony quoted by the Appeals Court to evidence their findings and again discussed in this Answer are self-serving and are being manufactured to mislead the Court. The purpose of misrepresenting the relationship of the authors of these declarations is questionable but when coupled with the unethical tactic of the witnesses having no personal knowledge of the majority of facts in their declarations, as presented below, makes this evidence extremely prejudicial.

Besides all these examples of misrepresented facts, the example presented in the Petition of how John Dean's declaration (Petition, Section III, Issue I, item 2, pages 14-16) was fabricated is another clear example of the SVB Defendants counsel's conduct.

If that isn't enough, an additional example of this tactic is presented when the former CEO and President of Silicon Valley Bank, Roger Smith, testified to the same legal practice of declarations being prepared by Hopkins & Carley Law Firm and he signing them with no personal knowledge of the facts declared in the document. On July 2, 1998, (page 161, 162) Roger Smith's deposition was taken and states;

A."THE WITNESS: I thought I had stated that I had not studied specific documents.
Q. MR. YANEZ: How did you assure yourself that what you were

signing under penalty of perjury was accurate?
MR. ROSS (Witness Counsel): You're talking about outside of working with counsel?
MR. YANEZ: Yes.
MR. ROSS: And things that may have been discussed and shown and –
MR. YANEZ: Right. I don't care. I'm talking about him personally.
MR. ROSS: So independent of whatever work you did with counsel is what he's asking about.
A. THE WITNESS: I felt comfortable working with the counsel who had been involved in this for many, many years in signing documents.
Q. MR. YANEZ: All right. So you, yourself, did not read the documents to assure yourself that what was stated there under penalty of perjury by you was correct. Is that true?
A. THE WITNESS: That is true.
Q. MR. YANEZ: All right. Now, the counsel you're talking about is Hopkins & Carley. Hopkins & Carley was corporate counsel for Silicon Valley Bank while you were there. Correct?
A. THE WITNESS: They were a law firm that we used. They were not – I would not say they were corporate counsel. They were one of our counsel.
Q. MR. YANEZ: Well, when Silicon Valley Bank went after USM in a lawsuit, Hopkins & Carley represented Silicon Valley Bank. Correct?
A. THE WITNESS: That is my understanding.

The counsel creating declarations to which the party signing has no personal knowledge has been well documented between the Petition and this Reply. There are undisputed facts and supporting evidence that not only did Hopkins & Carley Law Firm and attorneys Stephen Kottmeier and Jay Ross manufacture evidence to obtain the injunctions they have manufactured evidence to support their Motion for summary Judgement as well as other motions.

It is clear the CEOs of this large bank signed declaration in support of several motions without any personal knowledge. With this practice occurring at the CEO level inside Silicon Valley Bank, one can only guess at the impact on the evidentiary testimony of the lower level Silicon Valley Bank officers' declarations, regarding the many signed declarations and signed verifications provided in this case. This unethical practice has wide spread ramifications across the countless motions filed in the last two years under this case and is of such a serious nature that it places countless hours of court time in jeopardy. The Supreme Court must address this issue so as to stop the damages to this case before the damages become irreparable.

No doubt the Petitioners are In Pro Per and Stephen Kottmeier and Jay Ross are lawyers from Hopkins & Carley Law Firm. This should not prevent the courts from considering this unethical conduct. The Petitioners have brought legitimate allegations against the SVB Defendants and their counsel, to be dealt with in the legal system. As officers of the court Stephen Kottmeier and his colleague Jay Ross should have dealt very professionally with this matter so they could have become a good example of justice in our legal system, not the reverse. The evidence demonstrates that the lawyers are obstructing justice and misleading the court.

Accordingly, the Supreme Court should grant this Petition for Review. As the citizen of this land, Petitioners have the right to bring to the public, information related to potentially damaging banking practices, such as the ones in question here. In so doing, and in publishing their opinion of what public documents disclosed, Petitioners were exercising their First Amendment Right of Free Speech.

That SVB Defendants and B&N Defendants believed that these publications were somewhat defamatory is insufficient basis for supporting the issuance of such an over broad injunctions as was issued in this case. As previously noted, in this case it appears that there is a pattern of practice and conduct on behalf of SVB Defendants and B&N Defendants in engaging in irregular and highly suspect banking practices so much so that prior lawsuits have been filed against them. Moreover, at least for the bank defendant, the FDIC assumed control of the bank because of charges similar to those being made by Petitioners in the underlying case.

As noted, there is nothing benign about what the SVB Defendants have done in the underlying matter. Quite the contrary, the potential for continuing misconduct is such that the public must be warned of such a problem for its own protection.

B. The Evidence Demonstrates That Petitioners' Constitutional Rights Have Been Violated Due TO Defendants' Attorneys Stephen Kottmeier's and Jay M. Ross's Unethical Conduct.

The evidence through out this case has demonstrated that the Silicon Valley Bank's attorneys, Stephen Kottmeier and Jay M. Ross from the Hopkins & Carley Law Firm's unethical conduct and violation of their duty as officers of the court, have been the core of the violation of the Petitions' First Amendments Rights and the denial of their right to due process. For example, across this case there have been numerous declarations filed with the court which misstate the facts of the case. In both court room testimony and in arguments presented for the many motions which have been filed, the continued pattern of misrepresenting facts all the way to bold face lies have been argued as true facts by the SVB Defendants' legal counsel. Under Rule 5-200(b) of the State Bar

Rules for the State of California, an officer of the court, "Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." An attorney has an unqualified duty to refrain from acts that mislead the court, and the representations to a court of facts known to be false is presumed intentional and is a violation of the attorney's duties as an officer of the court.[*Jackson v. State Bar* (1979) 23 Cal. 3d. 509,513,153 Cal Rptr. 24, 591P.2d 47] The evidence presented in this Petition clearly show that Hopkins & Carley Law Firm and specifically, Stephen Kottmeier and Jay Ross, lack regard for the court.

The well documented practice of Hopkins & Carley Law Firm creating facts and manufacturing declarations, to which the witness who is signing has no personal knowledge of the facts included therein, is a serious offense and it is worthy of this Court's examination. To deny a citizen of the United States their constitutional rights based upon this practice is wrong.

This blatant manipulation of legal testimony has been well documented and is evidenced by multiple acts of wrongdoing, some of which have been presented to this Court. This pattern of offensive behavior is seriously obstructing justice and if left unchecked will lead to anarchy in the legal system. The continued Professional Misconduct, of defendants' attorneys Stephen Kottmeier and Jay M. Ross compromises the legal standard of this land. For the maintenance of high professional standards by attorneys and preservation of public confidence in the legal profession the Supreme Court should examine the Defendants attorneys conducts.

C. The Petitioners' Fourteenth Amendment Rights Are Being Violated.

The Petitioners' Fourteenth Amendment rights are being violated in that these injunctions are so over broad as to preclude them from discussing with any one the issue of the "character" of the defendants. The practical application of these two injunctions is that the Petitioners are barred from contacting witnesses and discussing the heart of the case. These over broad orders are written such that the Petitioners are barred from discussing the issues of the case with attorneys who are not the attorney of record. These issues was presented to the Appeals Court through a Writ in of June, 1997, to which the Appeals Court ruled "Appellant's application for clarification of preliminary injunction orders is deferred and shall be considered with the appeal on its merits." (Refer to Petition, Exhibit "D"). However, this clarification did not occur and the Fourteenth Amendment rights of Petitioners continue to be violated.

If the Supreme Court feels the issues presented would require the Appeals Court to rehear the case, the Supreme Court can grant the review and remand the case to the Appeals Court with instructions that there are violations of First Amendment rights, Statutory violations and violations

of Fourteenth Amendment rights and the Appeals Court should rehear the case in light of all the evidence. These serious violations of Petitioners' First Amendment and Fourteenth Amendment rights can not be left uncorrected.

The first of these two injunctions were granted from the bench on October 29, 1996 and have been in effect since that time. For just under two years, the Petitioners First Amendment rights have been unfairly curtailed while the court system progressed. These injunctions bare the Petitioners from certain forms of discovery as well as cut them off from exercising their First Amendment rights, which was one of their key vehicles in seeking professional and legal assistance[7].

It is clear the injunctions issued by the trial court must be vacated by this reviewing court as same are in clear violation of the Petitioners' First Amendment rights.

II.

ISSUE FOR REVIEW

THIS ORDER IS AN ABUSE OF DISCRETION AND VIOLATES THE STATUTORY REQUIREMENTS OF CALIFORNIA CIVIL PROCEDURE 529 WHICH MANDATES THE COURT TO REQUIRE AN UNDERTAKING ON THE PART OF THE SUCCESSFUL APPLICANT FOR INJUNCTIVE RELIEF.

The second issue presented is the injunctions were improperly issued because no undertaking was posted or even examined by the court as required by California Civil Procedure 529. California Civil Procedure 529 states:

> "On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction."

Both statutory law mandates this requirement and all supporting case law substantiates the requisite. The argument presented by opposing counsel will be shown to lack foundation and the Appellate Court was arbitrary and abusive in the cavalier manner in which they ruled on some facts and ignored others without an evidentiary hearing on the matter. For the courts

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[7]) On August 20, 1998, the Superior Court granted the Petitioners' attorney the right to remove himself due to financial hardship. The Petitioners are now seeking legal counsel to continue with their case to which the newsletters were assisting and without the newsletters their case is being prejudiced.

of the State of California to ignore this statutory requirement of the state so as to allow improperly obtained injunctions to remain and violate Petitioners First and Fourteenth Amendment rights is wrong.

The orders were improperly issued without the statutorily mandated requirement of the posting of an undertaking.

1. The Statutes Clearly State An Undertaking Is Required.

No undertaking was ever required by the trial court of any of the respondents in this case, and in fact, none was ever made despite the entry of the injunction orders presently under appeal. However, the conditioning of the issuance of a preliminary injunction upon the posting of an undertaking is statutorily required. [*ABBA Rubber Co. v. Seaquist,* (1991) 235 Cal. App.3d 1, 10] Indeed, on the granting of a preliminary injunction, the court is mandated to require an undertaking on the part of the successful applicant. California Civil Procedure 529, subdivision (a). In fact, it is clear that an injunction cannot take effect unless and until the party applying for it provides such an undertaking. [*City of South San Francisco v. Cypress Lawn Cemetery Ass'n,* (1992) 1 Cal.App.4th 916, 920].

While there are several statutory exceptions to the bonding requirements, in the absence of one of these exceptions, the courts have interpreted the bonding requirement strictly. [*Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 217] It is without a doubt that the undertaking is mandated and that none of the respondents come within any of the statutory exceptions to the requirements of CCP 529. Yet, there was never any discussion by the court, as required, at the two hearings on the preliminary injunctions with regard to the posting of an undertaking by any of the respondents. Additionally, while the Backstrom & Neal Order is also silent with regard to the posting of an undertaking, the SVB Order in its final paragraph states that "no bond or undertaking is required as a condition for this order taking effect." (Reference Exhibit "B2") Thus it is clear that the court failed to require the respondents to post the undertaking as mandated by law, and yet the Petitioners have operated within the strictures of the two orders, and have been precluded thereby from receiving the full benefits of their First Amendment rights.

2. The Argument By Opposing Counsel

The trial court was invited to commit error by Respondents herein by their failure to address the issue of an undertaking before the order was issued and by their failure to craft an order that is not egregiously violative of Petitioners' First Amendment rights. The orders (Refer to Exhibit "B1" and Exhibit "B2") are vague and over broad in their prior restraint of speech and the content of that speech. In addition, the prior restraint on

communications by fax to individuals is incongruent with the existence of Business & Professional Code, Section 17538 which requires businesses that fax transmission to stop from doing so if a recipient objects. There is no such restraint on individuals who may use this method of transmission from disseminating information on an issue of public interest.

It is clear that the statutes require an undertaking, and the lack there of is fatal to the order in question. Respondents' citation on this issue is limited to cases where there was an undertaking but its sufficiency was challenged. The instant case does not involve the question of the sufficiency of the undertaking, rather it goes to the issue of whether an undertaking is prerequisite for an injunction. It is statutorily required and there is none in this case. Further, it should be noted that the Respondents have cited no factual support on the record for their contention that the Trial Court considered the issue of the undertaking.

It is difficult to believe as the Appeals Court opinion tries to depict that the Trial Court believed the Petitioners had no damages when the Honorable Judge Peter Stone stated in testimony at the hearing regarding SVB preliminary injunction on October 29, 1996:

> "MR. KABIR: One other issue, your Honor. In August of 1995, Judge Levinger heard this exact same issue at that time and ruled in favor that it was – There's no preliminary injunction was issued. I'd just like to bring that up before the Court also.
> MR. ROSS: For purposes of clarifying the record, your Honor, that was in a separate lawsuit not involving the exact same parties.
> THE COURT: I think the First Amendment issues still exist."
> The trial court believed the First Amendment rights issues, which require the undertaking, were significant enough to comment on them, yet the Appeals Court erroneously interpreted the trial court's ruling rather than grant the appeal.

3. The Appeals Court Erred By Ruling For Judicial Convenience, In The Face Of Statutory Law, That No Undertaking Was Required.

Unless the successful applicant for the preliminary injunction comes within one of the exceptions specified in 529 (b), which this case does not and the Appeals Court concurred, or unless the court waives the bond requirement pursuant to CCP 995.240 for litigants who are indigent, the courts have interpreted CCP 529 bonding requirements strictly. See, [*Mangini v. J.G. Durand Intern.*,(1994) 31 Cal.App.4th 214, 217], citing [*ABBA Rubber Co.* 235 Cal.App.3d at 10] (A bond is an indispensable prerequisite to the issuance of a preliminary injunction), and [*In re Marriage of Van Hook*, (1983) 147 Cal.App.3d 970, 989] (Injunction is

void without undertaking.) and [*Millerv. Santa Margarita Land etc. Co.*, (1963) 217 Cal.App.2d 764, 766] (Preliminary injunction reversed because no bond ordered). (Other citations omitted).

The Appeals Court sensing the large defect in the argument of the respondents' counsel proceeded in their opinion to admit to the statutorial requirement for an undertaking until on page 17 of their opinion (Refer to Exhibit "A"), where the Appeals Court states:

> "These rules, however, have been developed in cases in which the opponent to the preliminary injunction would have sustained economic damages as a result of the enjoined conduct. The question we are presented with here is whether the trial court can dispense with the posting of a bond or undertaking where the party enjoined would suffer no damages as a result of the injunction."

If the trial court didn't hear the issue of Petitioners damages, when would the Petitioners present damages? The opinion of the Appeals Court was unfounded and capricious when they stretched the understanding of the statutory requirement and proceeded down their new path, that without a hearing on damages at the Superior Court level, they the Appeals Court could unilaterally rule on facts and evidence of damages. The Appeals Court attempted to side step the statutory requirement, which they can not, and hold the Petitioners to a different level of proof of damages than Respondents to which they were in error.

It is clear that these injunctions issued by the trial court violated statutory law and therefore must be vacated by this reviewing court. For this egregious statutory violation alone, this Court should intervene and reverse the ruling of the Sixth Appellate Court of the State of California.

III.
ISSUE FOR REVIEW

IN A PRIOR SIXTH APPELATE COURT RULING A REQUEST FOR CLARIFICATION OF THE PRELIMINARY INJUNCTION ORDERS WAS DENIED AND ORDERED BY THE SIXTH APPELLATE COURT TO BE CLARIFIED AT THE TIME OF THE INJUNCTION RULING NOW BEING REVIEWED. THIS CLARIFICATION OF THE INCONSISTENT ORDERS DID NOT OCCUR AND HAVE LEFT THE ORDERS VIOLATING THE PETITIONERS' FOURTEENTH AMENDMENT RIGHTS OF DUE PROCESS.

In the May and June 1997 time period the two Preliminary

Injunction orders (Refer to Exhibit "B1" & "B2") signed by the Superior Court were brought in front of the Sixth Appellate Court for a clarification ruling during a discovery dispute. The orders have been so twisted by the Respondents counsel's rush to cut off the Petitioners' voice to the public that it was unclear whether the two Petitioners, who were representing themselves in *Propria Persona* could disclose documents to assist them in finding legal counsel much less have access to certain third party witnesses. Further, the orders were inconsistent with each other. The order (Refer to Exhibit "D") returned by the Sixth Appellate Court in May 1997, denied the clarification and stated the orders would be clarified upon review of the appeal, which had already been filed.

In an evidentiary hearing on June 2, 1997 the Special Master, retired Appellate Court Judge the Honorable Harry Brauer, stated on the record that the orders (Refer to Exhibit "B1" & "B2") were inconsistent with each other and needed to be clarified.

The inconsistent nature of these orders is so obvious that all judicial bodies, including the Sixth Appellate Court, who have reviewed the orders have stated clarification was need. Yet they failed to do so, choosing rather to simple confirm the confusing orders and quash the ability of the Petitioners to publish their opinions.

The Petitioners' Fourteenth Amendment rights are being violated in that these injunctions are so over broad as to preclude them from discussing with anyone the issue of the "character" of the respondents. The practical application of these two injunctions is that the Petitioners are barred from contacting witnesses and discussing the heart of the case which in 1998 has resulted in witnesses who were former bank employees disappearing while the Petitioners were blocked and are blocked from contacting them prior to there disappearance. Further, these over broad orders are written such that the Petitioners are barred from discussing the issues of the case with attorneys who are not the attorney of record.
The Sixth Appellate Court failed to clarify the orders as per their own instructions and therefore this Court should intervene and reverse the ruling.

The orders issued by the Trial Court were inconsistent with each other. In May 1997 the Petitioners requested the Appellate Court to clarify the orders so as to allow the depositional testimony of Petitioners to be taken with out being in fear of violating the orders. On May 30, 1997 the Appeals Court stated regarding clarification of the orders (Refer to Exhibit "D") that:

> "Appellants' application for clarification of preliminary injunction orders is deferred and shall be considered with the appeal on its merits.
>
> Appellants' request for immediate stay of all discovery

proceedings is denied."

Yet in the order issued, there was no clarification. Both of the orders were upheld with their inconsistent statements regarding discovery.

In a discovery hearing regarding one of the inconsistencies these orders spawned, the Special Master retired Judge of the Sixth Appellate Court Harry Brauer on page 7 stated regarding the inconsistency of the orders,

> THE COURT: ---To a layman, I can understand how you might be concerned about this. What you, of course, are concerned with is that while the injunction at the behest of the bank very clearly excludes judicial proceedings, the injunction by the other people represented by Mr. Claypool did not say that. So you're saying that there's an inconsistency between the two.
>
> However, I can take care of that very easily, I can allay your fears by simple making an order as follows:
>
> That your deposition will be set for a time we will specify, and you must appear for that deposition, but before any question is asked, Mr. Claypool must file a document offering to stipulate to amend his injunction so that it will read exactly the way the bank's reads, namely, that judicial proceedings are except from the injunction so that there will be no conflict between the two injunctions whatever.

While Mr. Claypool says this on the record, perhaps it's just as good, but I think it's better to have it in writing, and you serve that before the date set for the deposition and also at the time of the deposition, Mr. Kottmeier would hand the copy to the Plaintiffs so that there is no question that they can say we haven't received it.

The Special Master acknowledges that the orders are inconsistent with each other on the above point, which in an of itself would require the Appeals Court to grant the Petitioners' appeal and send it back to the trial court for review. However, the Appeals Court acknowledges in their order that the clarification would be dealt with at the time of the appeal, yet their order is mute to any clarification ruling and remains inconsistent.

The overbroad nature of these orders and the practical implementation has resulted in violating the Petitioners Fourteenth Amendment rights when as a result of these orders the Petitioners have been blocked from critical witnesses in the case. Crucial documentation personnel of the bank along with others were noticed in July of 1997. At this time the individuals were employees of SVB. The injunctions block any direct contact with SVB personnel by the Petitioners. Petitioners must rely upon the legal counsel for SVB to contact any employees. However, after relying upon legal counsel and when it came time to depose critical witnesses these individuals had left the employ of the bank and had

disappeared out of state.

The bank is no longer responsible to produce these witnesses because they are not employees of the bank. Yet the Petitioners have no way to track these employees much less bare the financial burden of finding them. Critical information is being effectively removed from the case as a direct result of these over broad injunctive orders.

These orders are inconsistent and over broad and therefore, this review is warranted by the court. For the reasons stated herein above, Petitioner respectfully disagrees with the non published opinion of the Appeals Court on this issue. Petitioner respectfully requests that this Court reverse the Sixth Appellate Court non published opinion and vacate both the SVB Preliminary Injunction Order and the Backstrom & Neal Preliminary Injunction Order as violative of the Petitioners' First and Fourteenth Amendment rights, the statutory law governing the issuance of Injunctive Relief, and as clear abuse of the trial court's and the Appellate Court's discretion.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: January 11, 1999

Monem Kabir
In Propria Persona

Gregory P. Ruebusch
In Propria Persona

APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FILED
6th DIST COURT
APPEAL
JUNE 16 1998
Michael J. Yerly, Clerk
By_____

MONEM KABIR, et al.,
Plaintiff, Cross-defendants
and Appellants,

v.

SILICON VALLEY BANK et al,
Defendants, Cross-complainants
and Respondents.

ROGER SMITH, et al.,
Defendants and Respondents.

H0016518
(Santa Clara County
Super. Ct. No. CV760042)

/

Appellants, Monem Kabir and Gregory Ruebusch, appeal from an order granting preliminary injunctive relief to respondents, Silicon Valley Bank Roger Smith, Robert McMillan, Robert Gionfriddo, Sherry Stevens, Marc Cadieux and John Dean, and from an Order granting identical relief to respondents Backstrom & Neal, Robert Daney and Michael Spence. The Orders, in essence, enjoined appellants from further distributing copies of a document entitled " Do You Know the Truth Newsletter?" to businesses and individuals in the South Bay Area. The new letter contained allegedly false, defamatory and libelous statements concerning respondents.

Appellants contend both preliminary injunctions must be reversed because the trial court failed to require the posting of an undertaking as condition of granting the injunctions pursuant to code of Civil Procedure section 529, Subdivision (a).They also contend the injunctions are unconstitutional prior restraints on the exercise of their First Amendment rights to free speech. We disagree and affirm the orders.

Factual Background

On August 13, 1996, appellants, Monem Kabir and Gregory Ruebusch, filed a verified complaint for damages, which included causes of action for fraud, conspiracy to defraud, intentional interference with economic relationship and malicious prosecution. Respondents, Silicon Valley Bank, Roger Smith, John Dean, Marc Cadieux, Robert McMillan,

Appendix "A"

Robert Gionfriddo, Sherry Stevens, Backstrom & Neal, Robert Daney and Mike Spence were named as defendants. In essence, appellants alleged that Silicon Valley Bank (SVB) and its individual officers and employees conspired with the accounting firm of Backstrom & Neal and two of its accountants to create false loan documents and financial statements concerning one of SVB's loan customers, USM Technology, Inc. (USM). These documents were fabricated to allow SVB to claim that USM was in default on its loan with SVB, to force USM into bankruptcy and to take over USM's assets.

The complaint further alleged Ruebusch and Kabir were respectively the president and chief financial officer of USM. In December, 1991, after SVB began threatening to hold USM in default, Ruebusch and Kabir were instructed to sell USM at a price of $5 million to $7 million dollars. In December, 1991, USM contractually agreed with Ruebusch and Kabir that they would receive $800,000 and $300,000, respectively, based upon the sale price, for their outstanding performance at USM. On December 12, 1991, SVB sent USM a notice of default of its financial loan obligations. On February 4, and 12, 1992 Kabir and Ruebusch were involuntarily terminated from USM. In August, 1992, USM was placed with a court appointed receiver. On September 11, 1992 USM filed for Chapter 11 protection in the United States Bankruptcy Court. The bankruptcy petition was later converted to a chapter 7, petition. USM's bankruptcy was completed on or about April 4, 1995.

Respondent SVB filed a cross- complaint for damages and permanent injunction against appellants on September 16, 1996. The Cross-complaint contained causes of action for defamation, trade libel, interference with prospective economic advantage, permanent injunction, conspiracy, abuse of process and malicious prosecution. The defamation, trade libel and interference with prospective economic advantage causes of action were based upon the publication and distribution of a newsletter, entitled "Do You Know The Truth Newsletter?," and other documents to the public by appellants, which claimed SVB engaged in criminal and fraudulent business conduct. In the abuse of process and malicious prosecution actions, SVB alleged that appellants filed a complaint (CV356807) on March 22, 1996, against SVB and others which was immediately dismissed by the superior court for failure to comply with statutory procedures. SVB alleged that the action was filed as part of appellants' continuing efforts to extort funds from SVB after certain prior litigation instigated by appellants against SVB had gained them nothing or very little.

1. The Silicon Valley bank Respondents

On October 16, 1996, Respondents SVB, Roger Smith, John

Dean, Marc Cadieux, Robert McMillan, Robert Gionfriddo and Sherry Stevens filed an application for a preliminary injunction Pending trial. The application sought to stop the distribution of the " Do You Know The Truth News letter?" and other documents similar to them, via facsimile, to members of the San Jose business community without the prior consent of the recipient. Respondents also requested that appellants be enjoined from making and disseminating any false and defamatory statements regarding the SVB respondents, including accusations of criminal and fraudulent conduct. They claimed the accusations contained in the newsletters were false and detrimental to the SVB respondents' existing and potential client relationships.

To support their application respondents introduced the following information. Beginning in July, 1995, Kabir and Ruebusch began to publish and distribute leaflets entitled "Do You Know The Truth Newsletter?" By August 30, 1995, They had created approximately 11 separate issues of their newsletter and had mailed and handed out 10,000 to 20,000 copies of the documents t a mailing list containing 500 to 1000 names. The mailing list included attorneys and other professionals who were involved with the banking and accounting business. Although the distribution of the newsletter stopped during August, 1995, in or about November, 1995, appellants resumed its dissemination. They had created 41 issues as of October 6, 1996.

The News letters contained the following accusations concerning the SVB defendants: (1) In connection with its dealing with USM, SVB was crooked, falsified internal A/R audit confirmations, manufactured defaults by USM, used Wyle laboratories Corp. name to falsify a default by USM, and committed bank fraud in the course of lending money to USM; (2) Roger Smith, The president of SVB, lied t the shareholders of SVB about SVB's lending relationship with USM; (3) Robert Gionfriddo and Sherry Stevens committed perjury and falsified financials relating to USM, were involved in a cover up of SVB's bank Fraud and were puppets of Roger Smith for purposes of the cover up; (4) John Dean participated in the bank fraud in over bill the bank because he did not care and because attorneys were covering up the bank fraud for him.

The "Do You Know The Truth Newsletter?" was sent to at least the following businesses; San Jose Blue Print and Supply Company, Shilling & Kenyon, Inc., Comerica Bank, Silicon Valley Bank, Heritage Bank, Hopkins & Carley, Brach, Neal, Daney & Spence (formerly doing Business as Backstrom & Neal), and Pfahnl & Hunt. None of these businesses requested receipt of the newsletter nor were any contacted in advance to obtain consent to sending the news letter. Representatives

from these businesses declared that the newsletters interfered with business operations, in that they tied up facsimile machines and telephone lines, resulting in added costs for facsimile paper and administrative time relating to delivery and review of the documents.

Mare Cadieux, then a vice president of SVB, declared that from August, 1992, through the close of USM's bankruptcy in 1995, he was responsible for monitoring and supervising SVB's efforts to collect on loans defaulted by USM. He had seen and read the multiple issues of newsletters sent to SVB by appellants. All of the statements it contained were false. During the entire time that he had worked at BVB, he was not aware of any instance in which SVB committed fraud in its relationship with USM or anyone affiliated with it. SVB also did not falsify accounts receivable confirmations or any other documentation, nor did it manufacture defaults on the part of USM. SVB was never asked for its consent to receive the newsletters and never gave such consent. Customers, potential customers and other members of the community had asked about the accusations in the newsletters. Cadieux had been placed in the position of having to explain repeatedly the background and actual facts concerning the false claims in the newsletters.

John Dean, who was then the president of SVB, also declared that he had seen numerous issues of the newsletter, which had been sent to SVB without its consent, and that it contained allegations that SVB committed fraud, that he joined in the fraud and authorized a cover-up of the fraud. All of these statements were false. SVB committed no fraud against USM or anyone associated with it. He had never agreed to join in a cover-up and had not authorized such a cover-up. Further, SVB had not falsified accounts receivable confirmations or any other documentation and had not manufactured defaults. Potential customers, business referral sources and other members of the business community had approached him to inquire about the newsletters. He had been placed in a position of having to explain the falsity of the newsletter's content, The barrage of newsletters throughout the community had the potential of detrimentally impacting SVB's business, although it would be difficult to quantify the damage caused by the defamatory statements.

Robert Gionfriddo, who was then the Executive Vice President of Heritage Bank of Commerce in San Jose, declared that without prior consent he had received numerous issues of the newsletter at Heritage Bank. From March, 1990, to April 15, 1993, ha was an Executive Vice-President of SVB. During the entire time he worked at SVB, SVB did not defraud USM, nor did it falsify accounts receivable confirmations or other documentation nor manufacture defaults for USM, He had not committed perjury nor falsified any document, much less a financial document for

SVB. He had never been involved in any cover-up, and although he was a subordinate of Roger Smith, he was not his puppet. He had been questioned by members of the business community about the newsletters and was forced to counter the false information in them. He was concerned that the continuing barrage of these newsletters would detrimentally impact his business and reputation with persons not known to him or who had not approached him about :the documents. it would be difficult to quantify the damage caused by the defamatory statements.

Sherry Stevens, who was than employed by Comerica Bank, declared that she had been employed at SVB from the latter half of 1991 through the first half of 1992. During a portion of her employment at SVB she was the loan officer in charge of SVB's lending relationship with USM. shortly before the August, 1995, trial she began receiving the newsletters by mail and by facsimile at Comerica Bank. All of the negative statements in the documents were false. During the time she worked at SVB, she was not aware of any instance where SVB committed fraud against USM. SVB did not falsify accounts receivable confirmations nor manufacture defaults. She never committed perjury or falsified any document for SVB. She had not been involved in a cover-up and had not been a puppet of Roger Smith. She had been approached by members of the business community and was forced to explain the defamatory statements in the newsletters. She believed the barrage of newsletters posed a potentially detrimental impact upon her business and reputation and it would be difficult to quantify the damage caused by the statements.

John Schilling, certified public accountant and principal of the accounting firm of Schilling & Kenyon, declared that in the past year he had received 15 to 20 facsimile transmissions of the newsletter. At least one of the issues mentioned him and distorted comments he made in connection with a newspaper article published in the San Jose Mercury News in February, 1996. The newsletters were disruptive to business and his firm incurred costs related to the transmissions. Furthermore, he had been approached by clients and potential clients with questions about the newsletter, causing him to explain his prior professional relationship with SVB and Hopkins & Carley as it related to the false and outrageous claims in the newsletter. Although he could not quantify the exact impact, the distribution of the newsletter in the San Jose business community had detrimentally impacted his business and reputation.

Also included was a declaration by Stephen-Kottmeier, one of respondents' attorneys at the firm of Hopkins & Carley. He declared that the law firm had received numerous copies of the newsletters at issue and was continuing to receive the documents both by mail and by facsimile.

The newsletters charged Hopkins & Carley and certain of its attorneys with having taken part in a conspiracy to defraud. He further stated in case number CV757393 filed in the Santa Clara County Superior Court, the superior court held that appellants had failed, under Civil Code section 1714.10, to establish a reasonable probability of any such conspiracy.

In opposition apparently only to SVB's application for a preliminary injunction, appellants submitted their own declarations. 1 Appellant Monem Kabir declared that he assisted Gregory Ruebusch in the publication and distribution of the "Do You Know The Truth Newsletter?" The statements contained therein were truer and correct based upon his own personal knowledge and belief according to such information as was available to him. He had never threatened or coerced a potential witness, opposing attorney or parties to the legal action, The newsletter is published "for the purposes of presenting to the public the issue of how a state chartered bank, which is, federally insured, deals with its clients and how the political, legal, and financial machine of a local area supports the bank's irregularities, through the expressed opinions based on the true facts of the issues experienced by myself." Appellant Gregory Ruebusch's declaration contains the identical statements. Additionally appellant Ruebusch attached a copy of an article appearing in the San Jose Business Journal which indicated SVB had been involved in a lawsuit alleging that an employee of a company named Genus Inc. had embezzled money from her own employer.

2. The Backstrom & Neal Respondents

Backstrom & Neal, Robert Daney and Michael Spence filed an application for a temporary restraining order (TRO), which was granted,2 and an application for a preliminary injunction pending trial. The following evidence was introduced in support of the

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1) The record on appeal does not contain any written opposition to the application for temporary restraining order and preliminary injunction filed by respondents Backstrom & Neal, Robert Daney and Michael Spence.

2) The temporary restraining order, granted October 10, 1996, enjoined appellants from disseminating documents, or making statements, to anyone other than their attorneys regarding respondents' character or credibility, including that respondents had engaged in criminal activity and perpetrated fraud in preparing financial statements. 'Appellants were further enjoined continued from contacting respondents and coming within 100 feet of respondents Daney and Spence.

application for TRO and preliminary injunction.

Robert Daney, the managing partner of accounting and audit partner with the firm of Brach, Neal, Daney & Spence (formerly Backstrom & Neal), declared that shortly before trial in related litigation in this matter, he began to receive copies of the newsletter referred to above. The newsletters contained statements that ha had committed criminal activities and perpetrated a fraud. Copies of the newsletters were attached to his declaration. The barrage of newsletters circulated by appellants in the San Jose area had persisted over the past several months. Not only was the dissemination of the newsletters personally harassing, but he bad been confronted on numerous occasions by members in the community questioning him regarding the integrity of the representations contained in the newsletters. He was convinced the deluge had unfavorably impacted his firm's business, although it was difficult to place a dollar amount on the diminution in business as a result of the malicious comments.

In response to specific accusations contained in the newsletters, Daney denied having committed perjury in the previous litigation, committing any crime or criminal act under the Internal Revenue service Code section 7216, violating the AICPA Code, Rule 301, fabricating or falsifying a financial statement, selling client information to anyone. transferring confidential client information without the client's consent, participating in a cover-up, suffering a criminal conviction, having his professional license suspended or revoked, testifying that Michael Spence falsified a financial statement, engaging in any unethical activity, being informed by SVB that it would not do business with his firm, having been investigated by the State Board of Accountancy, representing to clients that he could land them money, manipulating books and records of a company, having any dealings with illegal drugs or money laundering, falsifying financial reports to cover-up fraud on the part of SVB, conspiring to fabricate USM's financial statements.

In a supplemental declaration Daney declared the statements in the newsletters to be untrue, defamatory and repugnant, and that he had spent numerous hours countering these disparaging remarks to his partners, clients and members of the business community. He could not recall a week over the past two years in which he had not spent some time countering the repeated untrue and outrageous lies about himself and members of his firm due to the harassment of appellants. His billing rate exceeded $200 per hour, and he had suffered thousands of dollars in lost revenue resulting from the loss of chargeable hours which would have been devoted to client projects as well as losing a significant amount of time which could have been devoted to client development.

He had suffered emotional strain and heightened anxiety as well.

Michael Spence, who was a partner of the accounting firm of Brach, Neal, Daney & Spence, similarly declared that over the past two and one half years, Spence bad spent a significant amount of time countering the attacks on his character and reputation contained in the newsletters circulated by appellants. He had had numerous meetings and phone calls with his partners, clients, business associates and business leaders in the San Jose community to refute the "untrue and outrageous lies" about himself and members of his firm. His billing rate exceeded $200 per hour. As a result of responding to the repeated inquiries, he had suffered thousands of dollars in lost revenue and had lost significant business time, including but not limited to client development. Although it would be difficult to quantify, his firm had lost a modest amount of revenue as a result of appellants' disparaging campaign. The newsletters accused Spence of the same criminal, fraudulent and unethical conduct attributed to Robert Daney. Spence denied all of the conduct attributed to him in the newsletters. He also claimed that the constant harassment of the appellants had had a negative effect on his business reputation throughout the community.

Randy Cowherd, an owner of San Jose Blueprint and Supply Company, declared that he had approached Dennis Brach of Brach, Neal, Daney & Spence at a Rotary meeting with his concerns after having received one of the newsletters at his work, Peggy Bradshaw, the senior vice president of community business banking at Comerica Bank, declared that on several occasions upon leaving work, she retrieved copies of the newsletter from the windshield of her car. The newsletter had been placed on the windshields of other cars in the parking structure. The newsletter attributed criminal and fraudulent activities to Brach, Neal, Daney & Spence. Because she had referred clients to Daney and Spence, she contacted Daney and questioned him about the integrity of the statements in the newsletters. John Pfahnl, a partner with Pfahnl & Hunt, declared he had received a similar letter by facsimile. He immediately brought the letter to Dennis Brach's attention and questioned him about the contents of the letter. Robert Gionfriddo, the executive vice president of Heritage Bank of Commerce, similarly declared he had received a newsletter and brought it to the attention of Daney and Spence.

3. The Trial Court Orders

The trial court granted both applications for preliminary injunction. The written order of the court granting the Backstrom & Heal application on October 29, 1996, provided appellants were enjoined and restrained from disseminating documents or otherwise publishing information to anyone, other than their counsel of record or between

themselves, any matters which accuse respondents of illegal or criminal acts of any kind, as well as any other defamatory statements, including but not limited to accusations that these respondents (Backstrom & Neal, Daney and Spence) prepared fraudulent financial statements, The order also prohibited appellants from contacting any of the respondents who were represented by counsel or coming within 100 feet of any of the respondents, their residences or their places of business. Although not specified in the written order, at the hearing the court held that appellants would be able to contact any independent third-party witnesses, disclosed or undisclosed, for purposes of preparation in the litigation.

On November 25, 1996, the trial court granted the preliminary injunction application of respondents SVB, Roger Smith, John Dean, Marc Cadieux, Robert McMillan, Robert Gionfriddo and Sherry Stevens. The court's written order provided that appellants were enjoined from: (1) transmitting or assisting in the transmittal of the "Do You Know The Truth Newsletter?" by facsimile to any business or individual without prior consent of the business or individual; (2) disseminating or assisting in the dissemination of documents or otherwise making statements to anyone other than their counsel of record or during proceedings before the court regarding the character or credibility of the SVB respondents, including but not limited to statements that respondents engaged in criminal activity, bank fraud or any other kind of fraud, perpetrated a cover-up or were dishonest.

Discussion

1. Undertaking

Appellants first contend the trial court abused its discretion in failing to require the respondents to post an undertaking upon granting the preliminary injunction. Code of Civil procedure section 529, subdivision (a), provides: "On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction, within five days after the service of the injunction, the person enjoined may object to the undertaking. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the order granting the injunction must be dissolved."

Neither the SVB respondents nor the Backstrom & Neal respondents addressed the issue of an undertaking in their moving papers below. Appellants also failed to request that an undertaking be imposed

as a condition of the injunction in their opposition papers. Furthermore the issue was not raised at either of the hearings in which the court granted injunctive relief. Following the November 12, 1996, hearing the SVB respondents prepared an order for the court to sign. The last paragraph of the order provided: "IT IS FURTHER ORDERED that upon consideration of the facts and circumstances of this case, including the nature of the relief sought and granted pursuant to this order, no bond or undertaking is required as a condition for this order taking effect." The proposed order submitted to the court by the Backstrom & Neal respondents was silent on the issue of an undertaking. Although appellants wrote to the trial court objecting to the proposed orders, they did not object to either order specifically on the ground that an undertaking had not been imposed.

The trial court's duty to require the posting of an undertaking pursuant to Code of Civil Procedure section 529 is mandatory. Indeed, several cases have held that an injunction does not become effective until an undertaking is required and furnished. (RBBA Rubber Co. v, Seaquist (1991)235 Cal.App.3d 1, 10.) While there are several statutory exceptions to the bonding requirements, in the absence of one of these exceptions, the courts have interpreted the bonding requirement strictly. (Mangini v. J.G. Durand international (1994) 31 Cal.App.4th 214, 217.) These rules, however, have been developed in cases in which the opponent to the preliminary injunction would have sustained economic damages as a result of the enjoined conduct. The question we are presented with here is whether the trial court can dispense with the posting of a bond or undertaking where the party enjoined would suffer no damages as a result of the injunction.

The purpose of the bonding requirement of section 529 is to protect the enjoined party from suffering any pecuniary damages should the injunction ultimately be determined wrongful. In setting the amount of the undertaking, the trial court's function is to estimate the harmful effect the injunction is likely to have on the restrained party. "That estimation is an exercise of the trial court's sound discretion, and will not be disturbed on appeal unless it clearly appears that the trial court abused its discretion by arriving at an estimate that is arbitrary or capricious, or is beyond the bounds of reason." (ABBA Rubber Co. v. Seaquist, supra, 235 Cal,App.3d at p. 14.)

Consequently, although imposing an undertaking is mandatory, setting the amount is discretionary wiU1 the court, and the amount is tied to the damages the restrained party will incur in the event the injunction is dissolved. If the restrained party can offer no evidence that he or she will suffer any monetary damages whatsoever as a proximate result of the

injunction, no violence to the purpose of the statute occurs if the trial court sets the amount of the undertaking at SO, or waives the posting of an undertaking under the particular facts of the case. Despite the mandatory language of section 529, case law does hold that a trial court may accept a stipulation by the parties that specifically provides no bond will be required as a condition of a preliminary injunction. (Greenly v. Cooper (1978) 37 Cal.App.3d 382, 385.)

Under the facto of our case, appellants introduced no evidence below and have suggested no facts on appeal that would lead a court to believe they would suffer monetary damages as a result of the imposition of the preliminary injunction. The injunctions prevent them from disseminating specific information to businesses in the area and to the public in general concerning their beliefs that the various respondents involved in the lawsuit committed crimes and are basically unethical and dishonest people. While appellants argue this violates their First Amendment rights, they do not suggest that they will suffer any economic damages as a result of the restraint on their ability to engage in their publication efforts. To the contrary, they undoubtedly will save money. The trial court's implied finding that no bond was necessary to protect appellants, therefore, is amply supported by the record.

Even assuming the trial court committed error by not requiring an undertaking, we fail to see how this has aggrieved appellants. Appellants do not suggest that they have incurred or will incur any damages as a result of the injunction. Reversing and remanding this cause for a further hearing on the issue of the amount of an undertaking, to allow the court to set the amount at some nominal sum ouch as $1, would be a waste of judicial resources and add unnecessary litigation coots to the parties in this case. We, therefore, find any error to be harmless beyond a reasonable doubt and decline to reverse the order on this basis.

Given this result, we need not address respondents' contention that appellants waived their right to challenge the amount of the undertaking on appeal because there wars no pre- order or post-order objection to the fact that no undertaking was being required. (See Glade v, Glade (1995) 38 Cal.App.4th 1441, 1448, fn. 7; Code Civ. Proc., § 529, subd. (a).)

2. Irreparable Harm

Appellants next contend respondents were not entitled to injunctive relief because they failed to establish they would be irreparably harmed by the publication of the newsletters or that there was no adequate remedy at law for the alleged harm. We disagree.

The decision to grant a preliminary injunction rests within the sound discretion of the trial court. That decision will be reversed on appeal only upon a clear showing of abuse of discretion. An abuse of discretion will be found only where the trial court's decision exceeds the bounds of reason or contravenes the uncontradicted evidence. (1T Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69; Grothe v. Cortlandt Corp. (1992) 11 Cal.App.4th 1313, 1316.) On appeal we view the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in favor of the trial court's order. (11 Cal.App.4th at p. 1317.)

In determining whether to grant or deny a request for preliminary injunction, the trial court must evaluate two interrelated factors. The first is the likelihood that the applicant will prevail on the merits at trial. The second is the interim harm the applicant may sustain if the injunction is denied compared to the harm that the enjoined party may suffer if the injunction is granted. (IT Corp. v. County of Imperial, supra, 35 Cal,3d at pp. 31-72; Crothe v. Cortlandt Corp., supra, 11 Cal.App,4th at pp. 1316-1317.)

The showing of harm an applicant must make in support of the request for injunction must correspond to one or more of the cases, in which an injunction is proper, as enumerated in Code of Civil Procedure section 526, subdivision (a). (Tahoe Property Owners' Assn, v. State Water Resources Control Ed. (1994) 23 Cal.App.Qth 1459, 1471; Coda Civ, Proc., § 526, subd. (a).) These cases include: (1) when it appears that the continuance of some act during the litigation would produce irreparable injury to a party to the action (S 526, subd. (a) (2)); (2) when pecuniary compensation would not afford adequate relief (§ 526, subd. (a) (4)); or (3) when it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief (§ 526, subd. (a)(5)).

We do not believe the trial court abused its discretion in finding respondents made a sufficient showing of irreparable injury. Irreparable injury occurs in cases involving wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by any accurate standard. (People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal.App.3d 863, 871.) The evidence presented at the hearings below demonstrated that there were continuous publications and distributions of the "Do You Know The Truth Newsletter?" The dissemination of the newsletter was widespread, with 10,000 to 20,000 issues sent to between 500 and 1,000 recipients in the San Jose business community. The newsletter, containing extremely inflammatory and derogatory comments about the various respondents,

clearly had a negative impact on the character and reputation of these respondents. The newsletter caused repeated inconvenience and administrative costs to the business recipients of the newsletter. It also had the potential of causing respondents to lose active and potential business clients and contacts. It was reasonable for the court to conclude from the declarations that the harm from the newsletter was not only continuing in character, but of the kind that would be difficult to quantify, being a loss of reputation and character and loss of potential business opportunities.

Appellants argue these damages are compensable through the appropriate common law causes of action. They cite the rule that if an applicant may be fully compensated by the payment of damages in the event he or she prevails, then preliminary injunctive relief should be denied. (Tahoe Keys Property Owners' Assn. v. State Water Resources Control Ed., supra, 23 Cal.App.4th at p. 1471.) However, the fact that causes of action may exist for damages based on defamation and libel does not necessarily mean a preliminary injunction may not be obtained, 'The damages for such wrongs in many cases are difficult to estimate or quantify, and this certainly supports the imposition of the injunction. Further, with the continued publication of the newsletter, respondents would have to bring multiple actions to fully recover the harm suffered upon each publication or distribution of leaflets. This is exactly the kind of case for which injunctive relief was designed. (Code Civ. Proc., § 526, subds. (a) (2) , (a) (4) , (a) (5) .)

The harm to appellants, on the other hand, was a temporary cessation of their publication efforts pending the trial of the underlying action. Weighing these two harms, the trial court clearly did not abuse its discretion in finding the harm respondents would suffer was the greater of the two.

3. First Amendment

Appellants finally argue the injunctions impose an impermissible prior restraint on the exercise of their First Amendment rights to free speech under the federal and state constitutions. The United States Supreme Court has held that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. (Nebraska Press Assn. v. Stuart (1976) 427 U.S. 539, 559.) There is a heavy presumption against the constitutional validity of any prior restraint and the party seeking to restrain expression has a heavy burden of showing justification. (Organization For A Better Austin v. Keefe (1971) 402 U.S. 415, 419.) Nevertheless, we find no constitutional infirmity with the preliminary injunctions under the particular facts of this case.

The First Amendment to the United States, Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These rights are safeguarded against state interference by the due process clause of the Fourteenth Amendment, Moreover, article I, section 2, subdivision (a), of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge the liberty of speech or press."

The chief purpose of the First Amendment is to prohibit prior restraints upon the freedom of speech and of the press. (Near v. Minnesota (1931) 283 U,S. 697.) Underlying this prohibition is the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open,....(New York Times Co. v. Sullivan (1964) 376 U.S. 254, 270; Leonardini v, Shell Oil Co. (1990) 216 Cal.App.3d 547, 537.) Indeed, case law, at least involving matters of public concern, holds prior restraints are not permitted even to stop the publication of an allegedly defamatory statement. (Gilbert v. National Inquirer, Inc. (1996) 43 Cal.App.4th 1135, 1344.) As the California Supreme Court stated, the published First Amendment cases "leave no doubt that the truth or falsity of a statement on a public issue is irrelevant to the question whether it should be repressed in advance of publication." (Wilson v. Superior Court (1975) 13 Cal.3d 652,658.) "The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form." (Id. at p. 659.)

The decisions, however, have consistently recognized that in certain exceptional circumstances an injunction restraining free speech or publication may be tolerated. For example, it has been said that the government may prohibit the disclosure of military secrets in time of war and prevent the utterance of words that may have the effect of force. Furthermore, an injunction restraining speech may issue in some circumstances to protect private rights, to prevent deceptive commercial practices and to enjoin obscene publications, (Near v. Minnesota, supra, 283 U.S. at p. 716; Gilbert v. National Inquirer, Inc., supra, 43 Cal.App.4th at p. 1145; Wilson v. Superior Court, supra, 13 Cal.3d at pp. 661-662.) It has also been recognized that in an ordinary case of trade libel between private parties involved in litigation, an injunction may issue to enjoin the further publication of the libelous information.

(Leonardini v. sell Oil Co., supra, 216 Cal. App.3d at pp. 578-579.)

We first note that our case does not involve a classic prepublication restraint of speech. Appellants, of course, have published their material, and have done so many times over since July 1995. The injunctive relief in the present case is designed to curtail the tortious and unlawful conduct of appellants in continuously publishing specific statements, contained in a newsletter, which have been found by the trail court to be false. Consequently, we are not presented with the potential of suppressing or quashing a person's ideas or beliefs on an issue before those ideas are actually freely expressed, published or spoken. Even the cases that are the most strongly critical of prior restraints on speech purport to make distinctions between an injunction that operates to redress an alleged private wrong and an unconstitutional prior suppression of speech. (see Organization For A Better Austin v. Keefe,supra, 402 U.S. at pp. 418-419; Near v. Minnesota, supra 283 U.S. at pp. 709, 711; Lawson v. Murray (1995) 515 U.S. 1110 [115 S.Ct. 2264, 2266-2267].)

Furthermore, there are certain limited classes of speech which may be prevented or punished by the state consistent with the principles of the First Amendment. These include "'Libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy and the like.'" (McCollum v. CBS, Inc. (1988) 202 Cal.App.3d 989, 999-1000; Lee v. Superior Court (1992) 9 Cal.App.4th 510, 517; Chaplinsky v. State of New Hampshire (1942) 315 U.S. 568, 571-572.)

With respect to libelous speech, the United States Supreme Court has made the observation that "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.....' Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." (Garrison v. Louisiana (1964) 379 U.S. 64, 75.)

Of course, there is no constitutional prohibition to enjoining speech that is not protected by the First Amendment. (Pittsburgh Press Co. v. Human Rel. Comm'n (1973) 413 U.S. 376, 389-390; Laurence Tribe, "American Constitutional Law," (2d ed.) Communication and Expression, §12-37, pp. 1054-1055.) However, in such cases, constitutionally adequate procedural safeguards must be utilized before a

prior restraint may be imposed. These safeguards include placing on the proposed censor the burden of proving the material is not protected, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo, and a prompt final judicial determination must be assured. (Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 560; People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 56-59; People v. E.W.A.P., Inc. (1980) 106 Cal.App.3d 315, 323.)

The speech involved in the present case on its face certainly falls outside the ambit of protected speech. Furthermore, before respondents were entitled to their injunctive relief, they had the burden of demonstrating to the court not only that they would suffer irreparable harm but also that there was a reasonable probability that they would prevail on the merits at trial. (Robbins v. Superior Court (1985) 38 Cal.3d 199, 206; San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App.Sd 438, 442.) That is, respondents had to demonstrate there was a strong likelihood they would prove appellants had committed defamation and trade libel by publishing the newsletters. The trial court obviously agreed with respondents in finding the objectionable statements in the newsletters to be false and defamatory. Although this is an interim finding, it is a judicial determination made following a full adversarial hearing. It is temporary in nature and will be dissolved should the court determine at trial that respondents have not made out their case for defamation and libel.

We also note that our case does not involve a matter of public concern or a public figure, which distinguishes this case from those relied upon by appellants. (See Organization For A Better Austin v. Keefe, supra, 402 U.S. 415; wilson v. Superior Court, supra, 13 Cal.3d 652; Gilbert v. National Enquirer, Inc., supra, 43 Cal.App.4th 1135.) This case arises from a lender- borrower relationship between SVB and USM. When USM defaulted on its loan obligations and eventually declared bankruptcy, appellants lost not only their jobs but the opportunity to earn a sizable commission upon a successful sale of the company. They blame SVB and the Backstrom & Neal respondents for these losses. While these facts have taken numerous hours of public judicial resources in the many lawsuits it has spawned, the matter is clearly one arising out of the very private efforts of the appellants to recover from respondents the individual economic losses they claim they incurred.

It has been said that First Amendment guarantees are not necessarily as stringent in a matter involving a private issue. For example, in a defamation or libel case involving a private figure, the plaintiff need not prove the defendant published the defamatory remarks with malice in

order to prove his or her case of defamation. Furthermore, the California Supreme Court had held that a prior restraint may issue on speech in order to protect private rights. (Magill Bros. v. Bldg. Service etc. Union (1942) 20 Cal.2d 506.)

In the Magill Bros. case, plaintiff operated two bowling alleys in the city of Los Angeles. Plaintiff sued defendant labor unions and their officers and members to enjoin them from maintaining pickets in front of its businesses and to recover damages for past unlawful picketing. The matter was tried before a trial court. The trial court found that defendants sought to unionize the bowling alley and to force plaintiff into signing a closed shop agreement. When plaintiff refused, defendants began picketing with false signs that read that a labor dispute was occurring between the employees of the bowling alley and the owners and that the employees of the bowling alley were on strike, in fact, there was no labor dispute at the bowling alley and all of the employees of the alley, who happened to be members of the union, had voted not to strike. Because of the picketing, some of plaintiff's employees stayed away and remained away. The trial court ultimately denied injunctive relief and plaintiff appealed.

The issue on appeal was whether the trial court erred in denying injunctive relief when it had found that the picketers carried banners and signs which conveyed false and untrue information to the general public. The defendants argued that the denial of injunctive relief should have been sustained, citing to cases which set forth the principle that equity will not grant injunctive relief against the publication of what might be, after publication, a libel or slander, out of deference to a defendant's constitutional right to Free speech. (20 Ca1.2d at p. 509.) The Magill Bros. court, however, held equity intervenes in a case such as this because picketing was one of the forms of collective bargaining that seeks to exert economic pressure upon an employer. Violent picketing and untruthful picketing were unlawful. Nothing in the California Constitution or in recent United States Supreme Court decisions compelled the court to hold the constitutional guarantee of freedom of speech was a bar to the intervention of equity where untruthful picketing was involved, A state policy which characterized the use of false or fraudulent statements in picketing as unlawful was within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech. The right to restrain the use of false or untruthful statements made in connection with picketing does not restrict the right to picket peacefully and honestly. (Id. at p. 512.) The Magill Bros. Case continues to be cited with approval for the proposition that an injunction restraining speech may issue in some circumstances to protect private rights. (wilson v. Superior

Court, supra, 13 Cal.3d at pp. 661-662; see also Gilbert v. National Enquirer, inc., supra,43 Cal. App.4th at p. 1145.)

As in Magill Bros., this case involves a private dispute between litigants in which one seeks to exert economic pressure or impose economic harm on another. Also, as in Magill Bros., the trial court impliedly found the statements published by appellants were untrue and defamatory. Given the trial court's findings, we believe an injunction could properly issue to protect the private rights of respondents without impinging on appellants' First Amendment rights. (Magill Bros. v. Bldg. Service etc. Union, supra, 20 Cal.2d at pp, 510-512; Leonardini v. Shell Oil Company, supra, 216 Cal.App.3d at pp, 578-579.) Organization For A Better Austin v. Keefe, relied upon by appellants, is distinguishable, in that case, the Organization For A Better Austin (OBA) believed Keefe, a real estate agent, utilized a business practice known as "block-busting" or "panic peddling." It was alleged that Keefe would contact homeowners in white neighborhoods, arouse their fears about blacks moving into the neighborhood, secure their listings and then sell the homes to blacks. Keefe's office was in Austin, but he lived in Westchester. He refused to sign an agreement proposed by the OBA that he would no -longer solicit such listings of homes for sale. While he denied engaging in "block-busting," he maintained he had a right under Illinois law to solicit real estate business as he saw fit. The OBA thereafter began distributing leaflets in Keefe's home town describing and criticizing his business practices.

Keefe sought an injunction against the distribution. Following an adversary hearing, the court issued a temporary injunction enjoining OBA from passing out leaflets or literature of any kind in the City of Westchester, Illinois. An Illinois appellate court affirmed the injunction upon the grounds that the OBA's activities had invaded Keefe's right to privacy, had caused irreparable harm and were without adequate remedy at law, The United States Supreme Court reversed. It held that peaceful pamphleteering is a form of communication protected by the First Amendment. The injunction, so far as it imposed a prior restraint on speech and publication, constituted an impermissible restraint on First Amendment rights. The injunction acted, not to redress private wrongs, but to suppress on the basis of previous publications, distribution of literature "of any kind" in a city of 18,000. (402 U.S. at pp. 418-419.)

Although the Supreme Court opinion includes language that "in a case of this kind Me courts do not concern themselves with the truth or validity of the publication," there was no adjudication of the issue of the truth or falsity of the material in OBA's leaflets; rather, the appellate opinion was based on an alleged violation of Keefe's right to privacy.

This, of course, differs from our case, in which we have a judicial determination of falsity. Furthermore, the injunction in our case acts to redress private wrongs based on appellants' use of unprotected speech.

Finally, although appellants do not address the issue in their opening brief, we agree with respondents that those portions of the injunctions which prohibit the faxing of the newsletter to businesses without prior consent of the recipient are constitutionally reasonable time, place and manner restrictions on appellants' free speech rights. (Bland v. Fessler (1996) 88 F,3d 729.)

Disposition

The orders granting injunctive relief to respondents are affirmed. Respondents shall be entitled to their coats on appeal.

_____

Wunderlich, J.

WE CONCUR:

_____

Premo, Acting P.J.

_____

Elia, J.

KABIR V. SILICON VALLEY BANK
H016518

Stephen J, Kottmeier, Esq. (State Bar #07f060)
Jon Michaelson, Esq. (State Bar #083815)
Jay M. Ross, Esq. (State Bar #151750)
HOPKMS 8t CARLEY
A Law Corporation
150 Almaden Boulevard, 15th Floor
San Jose, California 9511312089
Telephone: (408) 286-9800

Attorneys for Defendants ROGER SMITH, JOHN DEAN, MARC CADIEUX, ROBERT McMILLAN, ROBERT GIONFRIDDO and SHERRY STEVENS, and Defendant and Cross-Complainant SILICON VALLEY BANK

(ENDORSED)
FILED
Dec 23 4:46 PM '96
STEPEN V. LOVE
COUNTY CLERK
SANTA CLARA
COUNTY
BY DEPUTY

IN THE SUPERIOR COURT OF'THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

MONEM KABIR, and GREGORY P. RUEBUSCH,

Plaintiffs,

v.

SILICON VALLEY BANK, a California corporation, et al.,

Defendants,

CASE NO. CV-760042.

ORDER RE APPLICATION FOR PRELIMINARY INJUNCTION

AND RELATED CROSS-ACTION.

On November 12, 1996, the application for preliminary injunction by defendants ROGER SMITH, JOHN DEAN, MARC CADIEUX, ROBERT McMILLAN, ROBERT GIONFRIDDO SHERRY STEVENS, and Defendant and Cross-Complainant SILICON VALLEY BANK (collectively the "SVB Defendants") came on regularly for hearing in before the Honorable Peter G. Stone, in Department 17 of the above-entitled court.

Appendix "B1"

Stephen J. Kottmeier and Jay M. Ross, of Hopkins & Carley, a law corporation, appeared on behalf of the SVB Defendants; Brian Claypool, of Goostrey, Gustafson & Claypool, appeared on behalf of defendants Robert Daney end Mike Spence; defendant Won Choe appeared in propria persons, and plaintiffs and cross-defendants Monem Kabir ("Kabir") and Gregory Ruebusch ("Ruebusch") appeared in propria persona. Upon Consideration of the papers and argument submitted in support of and against the application, and the paper and documents on file herein, and good cause appearing therefor, the court issued an Order on November 25, 1996 GRANTING the requested application for preliminary injunction and ordering the SVB Defendants to prepare this order.

NOW, THEREFORE, IT HEREBY ORDERED THAT the SVB Defendants' application for preliminary injunction in GRANTED such that Kabir and Ruebusch, and any one acting in concert or participating with them or on their behalf, are hereby enjoined and restrained from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, any of the following acts pending trial in this matter:

1. Transmitting or participating in any way in the transmittal of their "Do You Know The Truth Newsletter," or any document similar to them, via facsimile to any business or individual without the prior consent of that business or individual;

2. Assisting in or in any way cooperating with, or providing information for the transmittal of their "Do You Know The Truth Newsletters," or any document similar to them, via facsimile to any business or individual without the prior consent of that business or individual;

3. Aiding and/ or abetting in the transmittal of their "Do You Know The Truth Newsletters, " or any document similar to them, via facsimile to any business or individual without the prior consent of that business or individual;

4. Disseminating documents or otherwise making statements to anyone other than their counsel of record herein or during proceedings before this court, regarding the character or credibility of the SVB Defendants, including but not limited to statements that the SVB Defendants have engaged in criminal activity, perpetrated any "cover up," bank fraud or any other kind of fraud, or any other statements which tend to indicate dishonesty by the SVB Defendants;

5. Assisting in or cooperating with the dissemination of documents or statements to anyone other than their counsel of record herein or during proceedings before this court, regarding the character or credibility of the SVB Defendants, including but not limited to statements that the SVB Defendants have engaged in criminal activity, perpetrated

any ""over up," "bank fraud" or any other kind of fraud, or any other statements which tend to indicate dishonesty by the SVB Defendants; and,

6. Aiding and/or abetting in the dissemination or making of statements to anyone other than their counsel of record herein or during proceedings before this court, regarding the character or credibility of the SVB Defendants, including but not limited to statements that the SVB Defendants have engaged in criminal activity, perpetrated any "cover up," "bank fraud" or any other kind of fraud, or any other statements which tend t indicate dishonesty by the SVB Defendants.

IT IS FURTHER ORDERED that upon consideration of the facts and circumstances of this case, including the nature of the relief sought and granted pursuant to this order, no bond or undertaking is required as a condition for this order taking effect.

DATED: Dec 18, 1996

PETER G. STONE
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM AND CONTENT.

By_____
Monem Kabir
In Propria Persona

By_____
Gregory Ruebusch
In Propria Persona

Brian E. Claypool, CSB No.: 134674
COOSTREY, GUSTAFSON 8t CLAYPOOL, LLP
1055 W. 7th Street, 20th Floor
Los Angeles, CA 90017

(ENDORSED)
FILED
MAR 14 1997
STEPHEN V. LOVE
COUNTY CLERK
Santa Clara County
By_____ DEPUTY

Attorneys for Defendants Backstrom & Neal,
Robert Daney and Michael Spence

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUEJTY OF SANTA CLARA

MONEM KABIR and GREGORY P. RUEBUSCH,
Plaintiffs,

Case No. CV 760042
[PROPOSED] ORDER
RE: ISSUANCE OF PRELIMINARY INJUNCTION

Vs.

SILICON VALLEY BANK et al.,
Defendants.

The Court in the above captioned matter conducted an Order To Show Cause Re: Issuance of 8ackstrom and Neal, Robert Daney, and Michael Spence's Preliminary Injunction on November 5, 1996. Brian E. Claypool appeared on behalf of defendants Backstrom and Neal, Robert Daney, and Michael Spence. Jay Ross appeared on behalf of defendants Silicon Valley Bank, Roger Smith, John Dean, Mere Cadieux, Robert McMillan, Robert Gionfriddo and Sherry Stevens. Plaintiffs Monem Kabir and Gregory Ruebusch appeared in Pro Per. After considering oral argument, the Court issued a preliminary Injunction which contains the following terms and conditions:

1. Plaintiffs and those acting in concert with them are enjoined and restrained from engaging or committing, performing directly or indirectly, the dissemination of documents or otherwise publishing information to anyone other than their counsel of record or

Appendix "B2"

between themselves any matters which accuse Backstrom and Neal, (currently known as Brach, Neal, Daney & Spence), Robert Daney, and Michael Spence or any other defendants of illegal or criminal acts, of any kind, as well as any other defamatory statements. This includes but is not limited to accusations regarding defendants having committed illegal acts and preparing fraudulent financial statements;

2. plaintiffs are prohibited from contacting in person, by telephone, or fax or by writing any of the defendants who are represented by counsel;

3. Plaintiffs are prohibited from coming within 100 feet of all of the defendants, including their residences or places of business, with the exception of any required appearances before the Court of Appeal;

4. Plaintiffs and ah those acting in concert with them are prohibited from participating in the dissemination of any documentation or otherwise participating in the publishing of information to anyone other than their counsel of record or between themselves any matters which contains defamatory statements against defendants including but not limited to accusations of illegal or criminal acts, or the preparation of fraudulent financial statements;

5. All terms and conditions set forth in the Temporary Restraining Order are to remain in full force and effect until the court signs the order issuing the Preliminary Injunction.

DATED: MAR 11 1997 PETER G. STONE

Honorable Judge Peter Stone

APPROVED AS TO FORM AND CONTENT

By_____

Monem Kabir

By_____

Gregory Ruebusch

Sixth Appellate District No. H016518
S072299
IN THE SUPREME COURT OF CALIFORNIA

MONEM KABIR Et Al., Appellants

v.

SILICON VALLEY BANK Et Al., Respondents

ROGER SMITH Et Al., Respondents

SUPREME COURT
FILED
Oct 14 1998
Robert Wandruff Clerk
DEPUTY

Appellants' petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

Appendix "C"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MONEM KABIR, ET AL.,,
Plaintiffs and appellants,

v.

SILICON VALLEY BANK, ET AL.,,
Defendants and respondents.

FILIED
MAY 30 1997
Court of Appeal Sixth
App. Dist.
MICHAEL J. YERLY, Clerk
By_____ DEPUTY

No. Ho16518
(Super. Ct. No. CV 760042)
Santa Clara County

BY THE COURT:

Appellants' application for clarification of preliminary injunction order is deferred and shall be considered with the appeal on its merits.

Appellants' request for immediate stay of all discovery proceedings is denied.

Dated MAY 30 1997

COTTLE, P.J. P.J.

Appendix "D"

(ENDORSED)
FILED
APR 9 1997
STEPHEN V. LOVE
County Clerk
Santa Clara County
By_____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

Monem Kabir and Gregory P. Ruebusch
Plaintiffs,

Case No. CV760042

Silicon Valley Bank et al.,
Defendants,

ORDER

The above-entitled matter came for hearing before the Honorable Peter G. Stone on April 3, 1997 at 9:00 a.m. in Department 17. The matter having been taken under submission, the Court orders as follows:

The court has considered the evidentiary objections raised by the parties, and has disregarded all inadmissible or incompetent evidence. Biliac Associates v. First Interstate Bank (1990) 218 Cal.App.3d 1410, 1419.

Defendant's Smith et al's motion for summary judgment/ summary adjudication of issues was filed on November 21, 1996. The motion was brought as to Plaintiff's complaint. Since the time of filing of the motion, Plaintiffs complaint has been twice amended, and now includes allegations against moving Defendants not found in the Original complaint. Despite the fact that the motion is improperly brought as to a superseded pleading, the Court will address the merits of Defendant's motion for summary *1* adjudication as if it were brought as to Plaintiff's second amended complaint.

The motion for summary adjudication of Plaintiffs fraud cause of action by Defendants Silicon Valley Bank, Gionfriddo and Stevens is denied. pact # 28 is in dispute, and Defendants have otherwise failed to meet their burden of proof to negate an Element Of the claims alleged. As to Defendants McMillan, Smith, Dean and Cadieux, the motion is treated

as a motion for judgment on the pleadings and granted with leave to amend. Plaintiffs have failed to state a claim for fraud against these Defendants.

The motion for summary adjudication of the conspiracy to defraud and intentional interference with prospective economic advantage claims is denied. Fed # 28 is in dispute, and Defendants have otherwise failed to meet their burden of proof to negate an element of the claims alleged.

The motion for summary adjudication of Plaintiff's cause of action for malicious prosecution is granted. The voluntarily dismissal of the prior defamation action was not a favorable termination. OPrian v. Goldrich Kest & Associates (199O) 220 Cal.App.3d 337, 344-345. Also, Defendants argument that Silicon Valley Bank had probable cause to bring the prior action is un-opposed by Plaintiffs.

The demurrer by Plaintiffs to the Silicon Valley Bank Cross-Complaint is overruled.

Dated; 4/9/97

"/S/"

Peter G. Stone
Judge of the Superior Court